UNITED STATES REPORTS

VOLUME 267

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1924

FROM JANUARY 19, 1925, TO AND
INCLUDING (IN PART) APRIL 13, 1925

ERNEST KNAEBEL
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

WILLIAM HOWARD TAFT, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
LOUIS DEMBITZ BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
EDWARD T. SANFORD, Associate Justice.
HARLAN FISKE STONE, Associate Justice.[2]

HARLAN FISKE STONE, Attorney General.[2]
JOHN G. SARGENT, Attorney General.[3]
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*.

[2] On January 5, 1925, President Coolidge nominated Harlan Fiske Stone, of New York, to fill the place left vacant by retirement of Mr. Justice McKenna. The nomination was confirmed by the Senate, and Mr. Stone was commissioned, on February 5, 1925. He took the oath in open court, and ascended the bench, on March 2, 1925.

[3] On March 17, 1925, President Coolidge nominated John G. Sargent, of Vermont, as Attorney General, to succeed Mr. Stone, resigned. The nomination was confirmed by the Senate and the appointment made on that day and Mr. Sargent took the oath on the day following.

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, HARLAN FISKE STONE, Associate Justice.

For the Third Circuit, LOUIS DEMBITZ BRANDEIS, 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, PIERCE BUTLER, Associate Justice.

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

For the Ninth Circuit, GEORGE SUTHERLAND, Associate Justice.

March 16, 1925.

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[1] For next previous allotment, see 266 U. S., p. IX.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1924.

GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, *v.* ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS.

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

No. 389. Argued January 8, 1925.—Decided January 19, 1925.

When state legislation has authorized and confirmed assessments of benefits on lands of a special improvement district and the mortgaging of these taxes as security for bonds to be sold to the public, and has provided in terms for collection of the taxes through a receiver to be appointed by a state court to pay the bonds in case of default, and the bonds are bought by the public upon this assurance, the power thus conferred upon the state court may be exercised by the federal District Court, in a suit to foreclose the mortgage in which jurisdiction otherwise exists through diversity of citizenship. P. 6.

298 Fed. 272, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals which reversed a decree of the District Court and directed that the bill be dismissed. The decree of the District Court was made in a suit brought by a trustee for bondholders, alleging diversity of citizenship, against a road improvement district, to foreclose a mortgage covering the assets of the district, including assessments for benefits already made and confirmed against the lands of the district. The decree directed a receiver to collect these taxes to the extent necessary to pay outstanding bonds and coupons.

Mr. G. B. Rose, with whom *Mr. D. H. Cantrell, Mr. J. F. Loughborough* and *Mr. A. W. Dobyns* were on the briefs, for petitioner.

The question is whether the statute creates a substantive right, or whether it deals merely with a remedy. If a substantive right is given, it will be enforced in the federal courts, according to the practice established in those tribunals. If only a remedy is given, unknown to federal jurisdiction, that remedy must be sought in the state courts.

Along with every mortgage there goes the right to the appointment of a receiver, where that course is essential to the protection of the mortgagee's interests. An improvement district is merely a creature of the Legislature, and the Legislature can impose upon it such liabilities as it deems fit. The Legislature has provided that so long as there is no default in the payment of the bonds, the property owners shall have a right to pay their taxes through the county collector. It has provided also that in case of such default the taxes shall be collected by a receiver appointed by the court on the application of the bondholders. That this right to the appointment of a receiver is a substantive one of the greatest value must be apparent to this Court, from its long and painful experience in matters of mandamus against public corporations.

By the terms of the statute creating the district, the bondholders were solemnly assured that if there should be default for thirty days in the payment either of principal or interest of the bonds a receiver would be appointed. It was upon the faith of this assurance that they bought the bonds. The law under which an obligation is issued enters into it and forms a part thereof, as completely as if fully set forth therein. It would be monstrous to hold that this solemn promise held out to the bondholders as an inducement to buy the bonds did not confer upon them

a substantive right which will be enforced by the federal courts.

This is particularly the case because the appointment of a receiver in a suit to foreclose a mortgage lien is a part of the ordinary equity jurisdiction of the federal courts; so that there is no attempt in the state statute to grant a remedy unknown to those courts, but merely to create a right which those courts will enforce in the manner provided by their rules and the practice in chancery.

What are substantial remedial rights is illustrated by numerous decisions of this Court. *Holland* v. *Challen,* 110 U. S. 15; *Devine* v. *Los Angeles,* 202 U. S. 313; *The Case of Broderick's Will,* 21 Wall. 503; *Ellis* v. *Davis,* 109 U. S. 485; *Farrell* v. *O'Brien,* 199 U. S. 89; *Sutton* v. *English,* 246 U. S. 199; *Gormley* v. *Clark,* 134 U. S. 338; *Louisville & N. Ry. Co.* v. *Western Union Tel. Co.,* 234 U. S. 370; *Reynolds* v. *Crawfordsville Bank,* 112, U. S. 405; *United States Mining Co.* v. *Lawson,* 134 Fed. 769, 207 U. S. 1.

This case comes exactly within the principle of the exception laid down in *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491. See also *Butz* v. *City of Muscatine,* 8 Wall. 575; *Bronson v. Kinzie,* 1 How. 311; *Howard* v. *Bugbee,* 24 How. 461; *Barnitz* v. *Beverly,* 163 U. S. 118, *Sheffield* v. *Witherow,* 149 U. S. 574.

Mr. Henry D. Ashley, with whom *Mr. J. F. Gautney* was on the brief, for respondent.

United States courts will not assume all jurisdiction that the State courts could assume. *Heine* v. *Board of Levee Commissioners,* 19 Wall., 655.

The right to have a receiver appointed for the purpose set out in the Act is not substantive but is purely remedial. No court has an inherent right to appoint a receiver to collect or levy taxes.

The right to levy and collect taxes can only be acquired by express delegation from the legislative body and can be exercised by no other body or person than the one designated by the Legislature.

The appointment of the receiver to levy and collect taxes is not on account of the equity powers of the Chancery Court of Poinsett County, but on account of an express delegation from the Arkansas Legislature. The right, therefore, is purely remedial and is not substantive so as to be administered by any other court.

The court erred in exercising jurisdiction herein, the Chancery Court of Poinsett County having first acquired jurisdiction. *Kline* v. *Burke Construction Company,* 260 U. S. 226.

A proceeding had in a proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world. *Milcreek Tp.* v. *Reed,* 29 Pa. St. 195; *Farmers Loan & T. Co.* v. *Lake St. Elevated,* 177 U. S., 51.

Section 13 of Act 322 provides that the Board of Commissioners shall enforce the collection by chancery proceedings in the Chancery Court of Poinsett County in the manner provided by Sections 23 and 24 of Act 279. Sec. 23 provides "Said proceedings and judgment shall be in the nature of proceedings *in rem.*"

The case brought in the United States District Court was a proceeding *in rem* and the suit in the Chancery Court of Poinsett County was begun before the suit in the United States District Court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought by the petitioner against Road Improvement District No. 7 of Poinsett County, Arkansas. It alleges that the District was organized under acts creating the District and in the second

statute confirming the District's assessment of benefits; that after the assessment the District issued its negotiable bonds, as authorized by the acts; that the bonds are in the hands of innocent purchasers for value before maturity; that, as also authorized, the bonds are secured by a mortgage of the assessments and all other assets of the District, to the plaintiff as trustee for the bondholders; and that by the terms of the acts after a default for more than thirty days in payment of interest or principal, a receiver shall be appointed to take charge of the affairs of the District. A default is alleged and is explained by a decree of the Chancery Court of Poinsett County that set aside the assessment securing the bonds and enjoined the District from paying any money belonging to it. The plaintiff and the bondholders were not parties to the suit and the decree saved their rights, but of course it prevents their getting any payment until they are relieved. The District Court made a decree for the plaintiff and directed a receiver appointed by it to collect the taxes theretofore levied to the extent necessary to pay the outstanding bonds and coupons. The Circuit Court of Appeals held that the District Court had no jurisdiction and ordered the bill to be dismissed. 298 Fed. 272.

The acts from which the District got its existence and power were Act No. 322 of the State for 1919, and Act No. 45 of the Acts of 1920, the second being an amendment of the first and a declaration and enactment that the assessments of benefits have been made and are confirmed. The plan of the first was that the assessment should be made at the outset and that thereupon the county court should enter an order 'which shall have all the force of a judgment' that there should be assessed upon the real property of the district a tax sufficient to pay the estimated cost of the improvement with ten per cent. added, in the proportion of the benefits, to be paid in annual instalments, not to exceed ten per cent. for any

one year. The tax is made a lien upon the land and in this way a security is created and the statute allows it to be mortgaged, as was done in this case. If any bond or coupon is not paid within thirty days of its maturity it is made the duty of the Chancery Court of Poinsett County to appoint a receiver to collect the taxes and pay what is due, and power is given to direct the receiver to foreclose the lien on the lands.

The ground on which jurisdiction was denied by the Circuit Court of Appeals was that the power to levy and collect taxes was a legislative function of the State which could not be usurped by a federal court. But while that may be true as a general doctrine, it cannot apply when a State has authorized and confirmed an assessment and a mortgage of it as security for bonds that the public is invited to buy, and has provided in terms for a collection by a receiver appointed in equity if there should be a default. There is no longer any legislative act to be done, and there is no usurpation of powers in following the course provided by state law. It seems to be recognized in *Meriwether* v. *Garrett,* 102 U. S. 472, that a receiver might be appointed by a Court of Chancery when that remedy was contemplated by the contract, as it fairly may be said to have been contemplated here. The subject matter of the mortgage and the possible foreclosure of the lien require the intervention of such a Court if right is to be done. In the argument before us there was some suggestion that the chancery power was confined to the state court named in the statute. But the decisions have done away with such a limitation and it was not relied upon by the Circuit Court of Appeals. *Madisonville Traction Co.* v. *Saint Bernard Mining Co.,* 196 U. S. 239; *Road Improvement District* v. *St. Louis Southwestern Ry. Co.,* 257 U. S. 547, 555. The state law is not merely an enlargement of the remedial powers of a local court as in *Pusey & Jones Co.* v. *Hanssen,* 261

U. S. 491, it recognizes the inadequacy of the remedy at law and is an attempt to give to purchasers of bonds the assurance of adequate relief against shortcomings that experience has taught the business world to apprehend. We see no reason why it should not succeed. *Campbellsville Lumber Co.* v. *Hubbert,* 112 Fed. 718. *Stansell* v. *Levee Board,* 13 Fed. 846. *Supervisors* v. *Rogers,* 7 Wall. 175.

The respondent attempted to open the general merits of the case. If there is anything in the effort, which we do not imply, we shall leave that for further consideration below. The Circuit Court of Appeals regarded the case as stopped at the outset by want of jurisdiction. In that we think it erred.

Decree reversed.

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

IN EQUITY.

No. 13, Original. Orders entered January 19, 1925.

Receivership Orders: 1 and 2. For payments to Kirby Petroleum Company by way of reimbursement for expense of drilling certain wells prior to receivership.

3. Requiring one Testerman to accept within 40 days moneys hereinbefore allowed him (265 U. S. 516, Par. 11) in discharge of claim; otherwise claim to be deemed abandoned and moneys paid to Secretary of Interior for United States.

4. Requiring contesting claimants as to expense of drilling of Burke-Senator well prior to receivership to adjust differences and accept reimbursement (265 U. S. 516, Par. 13) or show cause why claims should not be denied and moneys paid to Secretary of Interior for United States.

5 and 6. Pursuant to stipulations, moneys derived from certain wells to be paid to persons named as trustees, to hold pending determination of rights of rival claimants through litigation in Texas courts.

7. Motion of Texas for leave to file claim of interest in part of impounded funds denied because claim not presented within time hereinbefore limited (265 U. S. 518, Par. 18,) and of inequitable results were it now entertained.
8. Conflicting claims to funds derived from various wells referred to a special master to take evidence and report it with findings of fact, conclusions of law and recommendations; special directions as to time limits of proceedings, exceptions, authority to subpœna witnesses, use of existing evidence, allowances and expenses of master.
9. Disputed funds referred to in par. 8, may be paid over by receiver in accordance with stipulations of claimants effecting settlement or providing for further settlement by media other than this Court, provided such stipulations be filed before time fixed for taking of evidence by special master.

On consideration of the thirteenth report of the receiver herein the court makes the following orders:

1. The receiver is instructed to pay the net proceeds derived from well 155 amounting to $4,514.47, to the Kirby Petroleum Company by way of partly reimbursing it for expense incurred by it or its predecessor in drilling that well prior to the receivership—such payment to be in full discharge of all possible claims against the receivership by reason of that work and expense.

2. The receiver is instructed to pay a balance of $1,097.76 out of the net proceeds of well 156 to the Kirby Petroleum Company on its claim for expense incurred by it or its predecessor in drilling that well prior to the receivership—such payment to be in full discharge of all possible claims against the receivership by reason of that work and expense.

3. Unless within forty days from this date Tom Testerman shall accept the moneys directed to be paid to him by paragraph 11 of the order of June 9, 1924, in discharge of the claim therein described, he shall be deemed to have abandoned that claim and the moneys reserved to cover the same shall be paid over by the receiver to the Secretary of the Interior, as the representative of the United

States, as a part of the net impounded funds derived from the receiver's operations within the river-bed area. The receiver is instructed to deliver or transmit forthwith to Tom Testerman a copy of this order.

4. Unless within forty days from this date the operators who presented claims for reimbursement out of the proceeds of well 139 (known as the Burke-Senator well) for the cost of drilling that well prior to the receivership shall adjust the differences between them and accept reimbursement as contemplated in paragraph 13 of the order of June 9, 1924, they are directed to show cause, within five days after the expiration of that period, why those claims should not be denied and why the moneys reserved to cover them should not be paid over to the Secretary of the Interior, as the representative of the United States, as part of the net impounded funds derived from river-bed wells. The receiver is instructed to deliver or transmit forthwith to such claimants copies of this order.

5. Pursuant to a stipulation made and presented by the conflicting claimants thereto, the receiver is instructed to pay the balance of the net royalty interest in the proceeds of wells 97, 98, 99, 100, 102, 109, and 119 to A. H. Carrigan, as the joint agent and trustee of such claimants, to the end that he, according to such stipulation, may deposit such moneys in the First National Bank of Wichita Falls, Texas, there to be held to await the outcome of litigation now pending in the courts of Texas to determine the rights of such claimants in such royalty interest.

6. Pursuant to a stipulation made and presented by the conflicting claimants thereto, the receiver is instructed to pay to Rhea S. Nixon, Receiver of the Southwest Petroleum Company and trustee of certain claimants, 27/96 of the net balance of the operating interest in the proceeds of well 180 (after deducting the overriding royalty belonging to C. J. Ferguson), and also to pay to the Security

National Bank of Wichita Falls, Texas, 1/6 of the said balance—the 27/96 to be held by Rhea S. Nixon, as receiver and trustee, to await the outcome of litigation now pending in the courts of Texas to determine the rights of those who are claiming interests therein, and the 1/6 to be held by the Security National Bank to await the outcome of litigation now pending in those courts to determine the rights of those who are claiming interests therein.

7. The motion of the State of Texas presented January 16, 1925, for leave to file a claim for a royalty or owner's interest in a part of the impounded funds in the receiver's custody is denied,—because, as appears from the receiver's thirteenth report before mentioned, no claim thereto was presented by that State within the period prescribed by paragraph 18 of the order of June 9, 1924, because that period has long since expired, and because to permit such a claim by the State to be presented and entertained at this time would unreasonably prolong the receivership and would be inequitable to other claimants whose claims were seasonably presented.

8. The several conflicting claims to impounded funds derived from wells 152, 153, 154, 157, 159, 160, 162, 165, 169, 170 and 172 presented to the receiver under paragraph 18 of the order of June 9, 1924, and reported in his thirteenth report before mentioned, are referred to Joseph M. Hill, Esquire, of Fort Smith, Arkansas, as a special master, with directions that such special master take the evidence bearing on such claims and report the same to the court, together with his findings of fact, conclusions of law and recommendations in the premises, for the ultimate consideration and action of the court. The evidence shall be taken at Wichita Falls, Texas, and the taking thereof shall begin February 16, 1925, and shall proceed with reasonable expedition and be concluded not later than March 7, 1925. The report of the special master shall be

filed with the clerk within thirty days after the evidence is taken, and shall be printed by the clerk. Claimants shall have fifteen days after the filing of the report within which to prepare, print and file exceptions to it accompanied by supporting briefs. The special master shall have authority to issue subpoenas to secure the attendance of witnesses, and also authority to employ competent stenographic and clerical assistance. Claimants shall be permitted to introduce and use in evidence any documents or other instruments appearing in the printed records in this cause without procuring new exemplifications thereof or presenting other proof of their authenticity or identification. The special master shall receive an allowance covering his actual expenses and a reasonable compensation for his service. This allowance, together with the cost of his stenographic and clerical assistance and the cost of printing his report, shall be charged against and be borne by the several claimants in such proportions and in such manner as the court hereafter may direct. Each claimant, however, shall make to the clerk an advance payment of fifty dollars towards such costs within twenty days from this date; and in default thereof the claimant shall be deemed to have abandoned his claim.

9. If, before the time fixed for taking evidence under the last paragraph, the several conflicting claimants to any particular fund make and present to the receiver a stipulation adjusting their differences and settling their rights to such fund, or providing that the fund shall be paid over to a trustee of their selection to await an adjustment or adjudication of their claims through some medium other than this court, the receiver shall be authorized to give effect to such stipulation and to pay over the fund as therein provided, and the stipulation shall operate to withdraw the claims covered by it from the reference to the special master.

COLLEGE POINT BOAT CORPORATION *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 121. Argued November 17, 1924.—Decided January 19, 1925.

1. Claimant's preparations to perform its contract for furnishing supplies to the Navy were stopped as the result of steps taken by the Navy Department, for the purpose of avoiding useless production, without manifested intention to cancel the contract and without giving the notice requisite to the exercise of the unconditional right of cancellation existing under the Act of June 15, 1917, (*Russell Motor Car Co.* v. *United States*, 261 U. S. 514,) pursuant to which the contract was made. *Held*, that there was no cancellation as a matter of law, and that the stoppage of performance was an anticipatory breach. P. 15.
2. The Government's right of cancellation, under the above statute, is continuing and not lost by delay in exercising it. P. 16.
3. This continuing right of cancellation, limiting the value of the other party's right to require performance, curtails his damages for an anticipatory breach by the Government, so that prospective profits are not recoverable. *Id.*
4. There is no general rule that a party can not exercise a right to cancel a contract when himself in default. *Id.*
5. *Held*, that a default on the part of the Government was insubstantial and did not render inequitable delayed exercise of its right to cancel the contract. *Id.*
6. The right to cancel conferred by the Act of June 15, 1917, is not made dependent on a tender of 75% of the amount offered by the Government in settlement. P. 17.

58 Ct. Clms. 380, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for loss of profits anticipated under a contract with the United States, performance of which was stopped by the Government.

Mr. Julian C. Hammack and *Mr. Bynum E. Hinton*, for appellant.

The mere presence in a contract of a right of cancellation by one party, does not relieve that party from lia-

bility for breach of the contract. *Kenney* v. *Knight,* 119 Fed. 475.

Also the mere presence in a contract of the right of cancellation, if not exercised in accordance with that right, does not affect the measure of damages for breach. The injured party in such a case is entitled to recover his proven prospective profits. *Philadelphia etc. R. R. Co.* v. *Howard,* 13 How. 307.

The law is generally well settled that a party who is himself in default of performance cannot rescind. 13 Corpus Juris 614, § 662. It is also well established that a party cannot cancel a contract, even though a right to do so is expressly written in the contract, after a liability has occurred. This is so even where the extent of the liability is not then determinable. Black on Rescission and Cancellation, § 480.

As the contract has not been cancelled, no question of the application of the Act of June 15, 1917, is involved. Therefore *Russell Motor Car Co. Case,* 261 U. S. 514, is not decisive of the case at bar. That case, moreover, is otherwise clearly distinguishable on the facts.

There was no taking of this contract by the government. The stoppage of the physical work had to do with the subject-matter and could not constitute a cancellation or a taking of the contract. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502.

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

Mr. Justice Brandeis delivered the opinion of the Court.

On October 25, 1918, the College Point Boat Corporation agreed to manufacture for the Navy Department 2,000 collision mats. The United States agreed to pay therefor $641,200, and to supply the required canvas. On

November 11, 1918, the Armistice was signed. Soon after, the Navy Department informed the Corporation that the mats would probably not be needed, suggested that it stop operations, and asked it to submit a proposition for cancellation of the contract. This notification and request were received before the process of manufacture had been begun; but the Corporation had expended large sums in necessary preparations. Negotiations for settlement followed. They extended over nearly eight months and proved inconclusive. Without prejudice to the rights of either party, the United States made a partial settlement by taking over at cost raw materials which the Corporation had purchased or contracted for.

In November, 1919, this suit was brought in the Court of Claims to recover the further amounts claimed. The court found that, in addition to the amounts covered by the partial settlement, expenditures had been made, services rendered and charges incurred aggregating $5,112.42 in cost or value. For that amount it entered judgment. The claimant contended that the United States was under the ordinary liability of one who, having contracted for goods to be manufactured, without cause gives notice that he will not accept delivery; and that it was liable, also, for the prospective profits. *United States* v. *Speed,* 8 Wall. 77; *United States* v. *Purcell Envelope Co.,* 249 U. S. 313, 320. The court found that the Corporation was ready, willing and able to perform the contract; and that if it "be entitled to prospective profits on the contract work, the amount of such profits it would be entitled to recover, after allowing for its release from the care and responsibility which would have attended full performance of the contract, would be $123,980." As a conclusion of law, the court ruled that no part of these prospective profits was recoverable, because the United States had cancelled the contract. 58 Ct. Clms. 380. The case is here on appeal under § 242 of the Judicial Code.

There is no finding of fact that the contract was cancelled. Nor do the facts found warrant the conclusion that there was in law a cancellation before the suit was begun. The contract did not contain any clause authorizing cancellation other than for default by the plaintiff. There was no such default. The United States actually did have an unconditional right of cancellation. For the contract was made pursuant to the Act of June 15, 1917, c. 29, 40 Stat. 182. By virtue of the statutory provision, as was later held in *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, the right to cancel became, by implication, one of the terms of the contract. But, so far as appears, neither party knew that the United States had such a right. The Navy Department failed to give the notice requisite to terminate the contract. Its sole objective in suggesting that preparations for the performance of the contract be stopped was to avoid useless production. The Corporation necessarily acquiesced. The parties negotiated, seeking to find a basis on which they could agree to cancel and liquidate the obligation of the Government. In the negotiations, and in the agreements which embodied the partial settlement, the Navy used language inconsistent with an intention to exercise a right of cancellation. As its efforts to procure consent to cancel proved futile, stopping the work was an anticipatory breach.

The question remains whether the measure of damages recoverable for this breach is the same as it would have been if the Government had not possessed the right of cancellation. A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact.[1] He

[1] H. D. Williams Cooperage Co. *v.* Schofield, 115 Fed. 119, 121; Trinidad Asphalt Mfg. Co. *v.* Trinidad Asphalt Refining Co., 119 Fed. 134, 138.

may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.[2] An unconditional right to cancel can be availed of for the purpose of terminating a contract, even after suit brought, unless some intervening change in the position of the other party renders that course inequitable. Compare *Clough* v. *London & Northwestern Ry. Co.*, L. R. 7 Exch. 26, 33 *et seq.* Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it; among other reasons, because the statute conferred upon the Government also the power to suspend the contract. The right remained effective as a limitation upon the Corporation's right to have the Government accept and pay for the mats. This continuing right of cancellation, which was asserted later, in court, operated to curtail the damages recoverable. It limited the value of the plaintiff's right to require performance, and hence the amount and character of the loss for which compensation must be made. Prospective profits were not recoverable.

The Corporation contends that the United States had broken its agreement even prior to its notification to stop preparations for the performance of the contract; and that a party in default cannot exercise a right to cancel. There is no such rule of general application. The default referred to was not substantial. By the terms of the

[2] Carpenter Steel Co. *v.* Norcross, 204 Fed. 537, 539–540; Farmer *v.* First Trust Co., 246 Fed. 671, 673; E. H. Taylor, Jr., & Sons *v.* Julius Levin Co., 274 Fed. 275, 282; Lubriko Co. *v.* Wyman, 290 Fed. 12, 15; Boston Deep Sea Fishing & Ice Co. *v.* Ansell, L. R. 39 Ch. Div. 339, 352; In re London & Mediterranean Bank, Wright's Case, L. R. 7 Ch. App. 55; Baillie *v.* Kell, 4 Bing. N. C. 638, 650.

contract the United States was to furnish the canvas within thirty days, that is, on November 25. It did not do so. Two weeks before that date the Armistice had been signed. On December 3, the Corporation requested that the canvas be supplied. On December 6 it received from the Navy notice that the mats would probably not be needed. Neither these facts, nor any other found, render inequitable a delayed exercise of the right to cancel.

It is also urged that the Navy did not tender to the Corporation 75 per cent. of the amount which it offered in settlement. The right to cancel conferred by the Act of June 15, 1917, is not made dependent upon such tender. The Corporation made no demand for that amount. Moreover, for aught that appears, it has actually received a larger percentage. With the amount awarded by the lower court, it will receive full compensation.

Affirmed.

EPHRAIM LEDERER, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF THE STATE OF PENNSYLVANIA, *v.* FIDELITY TRUST COMPANY.

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

No. 184. Argued January 15, 16, 1925.—Decided January 26, 1925.

1. Railroad equipment certificates issued by a trust company as security for money advanced by a syndicate to purchase equipment leased by the trust company to a railroad under contract for periodical payments, as rentals, and ultimate acquisition of title by the latter, and which are payable with interest to bearer or registered holder from the rentals thus to be paid by the railroad,—*held* subject to stamp tax, under Title XI, §1100 and schedule A (1) of the Act of February 24, 1919, c. 18, as in the category of "instruments . . . issued by any corporation . . . known generally as corporate securities." P. 20.

289 Fed. 1009, reversed.

42684°—25——2

CERTIORARI to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court in favor of the petitioner, in an action brought by the respondent to recover the amount of a stamp tax paid under protest.

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

Mr. H. Gordon McCough, with whom *Mr. James McMullan* was on the brief, for respondent.

For a proper consideration of this subject it is essential that a clear understanding be had of the nature of the certificates in question.

A railroad company, needing additional rolling stock, goes to its banker, who undertakes to arrange for the building of the cars needed according to specifications furnished and the hiring of the same to the railroad company under a form of bailment, by which, on payment of all rental reserved, the railroad company is given the option to purchase the equipment for one dollar. The operation is financed by the banker arranging with a trust company to receive subscriptions for the purchase of the desired rolling stock, to contract with the car builders for the purchase of the same, and as agent for the owners to lease the equipment to the railroad company at rentals agreed upon, and to issue to the subscribers certificates evidencing their equitable ownership and certifying that out of the rentals to be received by the trustee the holders will be entitled to the amount of such certificates with dividends as stated.

It is to be observed that the certificate is not a certificate of indebtedness; that there is no debtor; that it is merely the declaration of the trustee, as agent of the holder of the certificate, that it will collect for his benefit and that of other owners the rentals expressed in the

lease and distribute the same *pro rata.* If not paid at maturity no action of debt would lie upon such certificate.

Equipment certificates are frequently referred to by writers on economics and finance as bonds or notes or corporate securities. Such description is quite proper where the certificates referred to are the direct obligation of the railroad company lessee, but not where the certificates are in the form of those taxed in the case at bar.

The Government's argument that the form of the agreement is for practical purposes immaterial is directly at variance with the decision of this Court in *United States* v. *Isham,* 17 Wall. 496, that the liability of an instrument to stamp duty is determined by the form and face of the instrument.

The words of the statute are definite, precise, grammatically expressed and free from ambiguity. The tax is imposed on " all instruments (however termed) issued by any corporation (with interest coupons or in registered form) known generally as corporate securities."

The equipment certificate here taxed is not a certificate of indebtedness or a corporate security. It is not the obligation of a corporation to pay money owing by it, nor does it evidence an indebtedness secured on the property of a corporation. It is a mere declaration of trust and defines the holder's ownership of the equipment leased to the railroad company and the extent of his interest in the moneys to be received as rental therefor. Neither the railroad company nor the trust company is indebted to the certificate holders. The railroad company is obligated to pay rental for the use of certain equipment, and the trustee, to which such rental is paid, has to turn over to each certificate holder his proportionate share when and as received.

The certificate is merely the evidence of the holder's equitable ownership of an undivided interest in the equipment leased to the railroad company and the rentals pay-

able therefor. How, then, can such muniments of title be termed "corporate securities"? See *Edwards* v. *Chile Copper Co.* 273 Fed. 452. "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used. *Gould* v. *Gould,* 245 U. S. 151; *United States* v. *Merriam,* 263 U. S. 179.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the Fidelity Trust Company to recover $450 and interest, paid by it under protest for internal revenue stamps which the Collector, Lederer, required it to attach to railroad equipment certificates drawn in a form set forth. The parties agree that the only question is whether these certificates are subject to a stamp tax under the Act of February 24, 1919, c. 18, Title XI, § 1100, and Schedule A (1); 40 Stat. 1057, 1133, 1135. The section imposes a tax according to the schedule and the material part of the schedule is as follows: "1. Bonds of indebtedness: On all bonds, debentures, or certificates of indebtedness issued by any person, and all instruments however termed, issued by any corporation with interest coupon or in registered form, known generally as corporate securities, on each $100 of face value or fraction thereof, 5 cents." The question more narrowly stated is whether the certificates are instruments issued &c. known generally as corporate securities. The Circuit Court of Appeals reversing the judgment of the District Court held that they were not within the schedule, that "no indebtedness is involved or obligation incurred by the trustee to the holder, but it is simply a certificate of the holder's right to proportionate participation in a rental when paid." 289 Fed. 1009, 1012. A writ of certiorari was granted by this Court.

Using a familiar device the Fidelity Trust Company agreed to furnish and let to the Interstate Railroad Com-

pany 500 specified cars and the lessee agreed to pay $90,000, being one-tenth of the cost of the cars, annually at certain dates, and three per cent. half yearly on the part then unpaid. When the whole amount should be paid the trustee agreed to sell the cars to the railroad company for one dollar. As part of the same transaction by an instrument reciting that subscriptions had been secured through certain bankers to a fund, to be known as Interstate Railroad Equipment Trust, Series "C," for the payment of the price of the railroad equipment described in the lease, and that the trustee proposed "to secure to the parties subscribing" to the fund the payment thereof in ten annual instalments with interest at six per cent., the trustee covenanted with the railroad on receipt of the money subscribed to issue to the bankers the certificates in question here. The essential features are that the bearer or registered holder is entitled to one share of $1,000 in Interstate Railroad Equipment Trust, Series "C," in accordance with the above agreement, referred to; that the principal shall be payable at the dates of the payments by the railroad, one-tenth of the certificates, identified by number, each year, and in the meantime dividends will be payable as evidenced by dividend warrants attached, principal and interest payable in gold &c., "but only from and out of the deferred rentals when paid as provided in" the lease referred to.

The petitioner asks us to look through the form of the arrangement and give it a somewhat different meaning. The respondent on the other hand says in the language of *United States* v. *Isham*, 17 Wall. 496, "whatever upon its face [the instrument] purports to be, that it is for the purpose of ascertaining the stamp duty." We are content to adopt the respondent's rule for this case, as upon any rule the result seems to us clear.

As a matter of common speech, to which the statute refers, we have no doubt that these instruments would be

known as corporate securities. They would be called so more accurately than some other documents which we believe also would be known generally by that name. Their purpose, as stated in the agreement of the trustee with the railroad, is to secure payment to the holder with interest. They do nothing else. We do not regard the precise limits of the Trust Company's undertaking as important. If it were only to collect and pay money received by the Company under the secured contract of the Railroad it would be a security for money payment. But the counsel for the Company seemed not prepared to argue that the Company could not put the money received from the Railroad into its general account without a breach of trust, and give the certificate holder cash or a check for his interest or principal. But be the undertaking greater or less, the security better or worse, we cannot regard these certificates as anything but corporate securities by general understanding and in fact.

Judgment reversed.

DIRECTION DER DISCONTO-GESELLSCHAFT *v.* UNITED STATES STEEL CORPORATION, PUBLIC TRUSTEE, EGREMONT JOHN MILLS, ET AL.

BANK FÜR HANDEL UND INDUSTRIE *v.* UNITED STATES STEEL CORPORATION, PUBLIC TRUSTEE, ENGLISH ASSOCIATION OF AMERICAN BOND AND SHAREHOLDERS, LTD., ET AL.

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

Nos. 676 and 677. Argued January 9, 1925.—Decided January 26, 1925.

1. Certificates of shares in a New Jersey corporation, endorsed in blank and owned and held by German corporations, were seized

in London during the late war by the Public Trustee, a corporation sole appointed under the English law to be custodian of enemy property. *Held* that the ownership of the paper was dependent upon the law of the place where it was at the time, viz., England, and, as the things done in England transferred the title to the certificates to the Public Trustee by English law and as, by the law of New Jersey and the law of England, the owner of such certificates may write a name in the blank endorsement and thus entitle the nominee to obtain registration on the books of the corporation and issuance of new certificates to himself, the Trustee was entitled to pursue this cause as against the German corporations, there being no assertion of power by the United States to the contrary. P. 28.

2. Consequently, a decree of the District Court recognizing this right and directing the New Jersey corporation to issue new certificates to such nominee on surrender of the old ones properly endorsed did not deprive the German corporations of property without due process of law. *Id.*

300 Fed. 741, affirmed.

APPEALS from two decrees of the District Court in suits brought by the appellant German corporations to establish their titles to shares of stock of the Steel Corporation, the certificates for which, endorsed in blank, were seized at London during the War and passed to the Public Trustee of England, as custodian of alien property. The defendants were the Steel Corporation, the Public Trustee, and stockholders of record who disclaimed interest. The title to the shares, with the right to registration, and accrued dividends, was adjudged to be in the Public Trustee.

Mr. John Weld Peck and *Mr. John Wilson Brown, III,* with whom *Mr. Alfred K. Nippert* was on the briefs, for appellants.

Our entire case is based on the proposition that a seizure of certificates in Great Britain does not constitute a seizure of the shares of the New Jersey corporation represented thereby. *Chicago Rock Island Co.* v. *Sturm,* 174 U. S. 710.

The basis of jurisdiction is actual power and its existence must be determined by close adhesion to the actual facts.

The question here is not as to where fictions of convenience have, from time to time, thrown shares for purpose of taxation, administration and the like.

The question is: Where can power be exerted so as actually, irrevocably and effectively to subject all that there is of a share of stock to that power? The answer is, obviously: Where the corporation is and there only.

Jurisdiction of property, separate from its owner, can be acquired and exerted only when, and to the extent, that such property is actually within the territorial jurisdiction. *Pennoyer* v. *Neff,* 95 U. S. 714; *Boswell* v. *Otis,* 9 How. 336; *Cooper* v. *Reynolds,* 10 Wall. 308; *McElmoyle* v. *Cohen,* 13 Pet. 312; *D'Arcy* v. *Ketchum,* 11 How. 165; *Thompson* v. *Whitman,* 18 Wall. 457; *McDonald* v. *Maybee,* 243 U. S. 90; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194.

A seizure of shares of stock, to be effective, must be real and actual as opposed to anything constructive. *Miller* v. *United States,* 11 Wall. 268; *Phoenix Bank* v. *Risley,* 111 U. S. 125; *Chase* v. *Wetzlar,* 225 U. S. 79.

Since a share of stock is intangible, incorporeal (*Miller* v. *Kaliwerke,* 283 Fed. 746), and in the nature of a chose in action (*Jellenik* v. *Huron Copper Co.,* 177 U. S. 1), it is fundamentally incapable of manucaption. Yet it is clear that in the absence of statute one in position to compel the issuing corporation may, by compulsion, derive all the fruits of any particular shareholder's rights, and neither the shareholder nor any other not having power to compel the corporation can oust from that position of advantage. Therefore it seems further clear that it is only at the corporate domicile that a seizure of a share, in any sense real and actual, can be made.

Shares similar to those in suit have such existence at the corporate domicile as to found jurisdiction *in rem*, and may be levied upon, attached, and garnished by service on the corporation, although the certificate, its holder, and its owner be outside the jurisdiction. *Jellenik* v. *Huron Copper Mining Company*, 177 U. S. 1; *Hudson Navigation Company* v. *Murray*, 223 Fed. 466; *Schultz* v. *Diehl*, 217 U. S. 594; 54 Fed. 896; *Ashley* v. *Quintard*, 90 Fed. 84; *Einstein* v. *Georgia Southern Ry. Co.*, 120 Fed. 1008; *Gundry* v. *Reakirt*, 173 Fed. 167; *Shaw* v. *Goebel Brewing Company*, 202 Fed. 408; *Gideon* v. *Representative Securities Corporation*, 232 Fed. 185; *Harvey* v. *Harvey*, 290 Fed. 653; *Andrews* v. *Guayaquil Ry.*, 69 N. J. Eq. 211, (affirmed) 71 N. J. Eq., 768; *Sohege* v. *Singer Mfg. Co.*, 73 N. J. Eq., 567; *Amparo Mining Co.* v. *Fidelity Trust Co.*, 75 N. J. Eq., 555.

The *Jellenik* decision has been applied and strictly followed by the federal courts in determining the validity of the seizure of shares of stock by the Alien Property Custodian of the United States under the provisions of the Trading with the Enemy Act. *Columbia Brewing Co.* v. *Miller*, 281 Fed. 289; *Garvan* v. *Marconi Wireless Co.*, 275 Fed. 486; See particularly *Miller* v. *Kaliwerke, etc.*, 283 Fed. 746.

Shares cannot be captured except at some domicile of the corporation where transfer can be enforced. The presence of endorsed certificates beyond such domicile is not enough. *Baker* v. *Baker*, 242 U. S. 394; *Ashley* v. *Quintard*, 90 Fed. 84.

The English cases and writers upon international law sustain this view. Dicey Digest of Law of England; *The Attorney General* v. *The New York Breweries Co.*, 1 Q. B. (1898), 205; *Attorney General* v. *Bouwens, 4 Meeson & Welsby*, 171–191; *Stern* v. *The Queen*, 1 Q. B. (1896) 211; *Winans* v. *The King*, 1 K. B. (1908), 1022; *New York Life Insurance Co.* v. *Public Trustee*, 40 Times L. R. 430; *Cassidy* v. *Ellahorst*, 110 O. S. 405, 1924.

That the certificates were endorsed does not alter the case. *Colonial Bank* v. *Hepworth,* L. R. 36 Ch. Div. 36, 53, 54.

Yazoo and Mississippi Railroad v. *Clarksdale,* 257 U. S. 10, presented no question of the situs of shares.

The weight of American authority is that foreign attachment does not lie against shares of a non-resident corporation merely by the seizure of the certificates. *Baker* v. *Baker, supra; Christmas* v. *Biddle,* 13 Pa. St. 233 (1850); *Winslow* v. *Fletcher,* 53 Conn. 391; *Tweedy* v. *Bogart,* 56 Conn. 419; *Sheep & Wool Co.* v. *Traders Bank,* 104 Ky. 90; *Gundry* v. *Reakirt,* 173 Fed. 167; *Pinney* v. *Neville,* 86 Fed. 97; *Armour Brothers Banking Co.* v. *St. Louis Nat. Bank,* 113 Mo. 12; *Richardson* v. *Bush,* 198 Mo. 174; *Ireland* v. *Globe Milling Co.,* 19 R. I. 180; *Maertens* v. *Scott,* 33 R. I. 356; *Daniel* v. *Gold Hill Mining Co.,* 28 Wash. 411; *Reid Ice Cream Co.* v. *Stephens,* 62 Ill. App. 334; *Smith* v. *Downey,* 8 Ind. App. 179.

International law is clear and sweeping in its principle that incorporeal things including rights can be seized only by seizure of the corporeal thing to which the right is attached.

Were that not so, any sovereign might by his own laws situate incorporeal things within his jurisdiction and then proceed under color of right established by his law to possess the thing corporeal, in whatsoever country it was situate. Phillimore's Int. L. (3d Ed.), Vol. 3, at page 817 et seq.; *The Antelope,* 10 Wheat. 66; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265.

The principles here considered are strikingly like those involved in *Baglin* v. *Cusenier,* 221 U. S. 581.

No confirmations of the treaty of Versailles apply.

Mr. Wm. Averell Brown, with whom *Mr. Kenneth B. Halstead* was on the brief, for United States Steel Corporation.

Mr. Frederick R. Coudert, with whom *Mr. Howard Thayer Kingsbury* and *Mr. Mahlon B. Doing* were on the brief, for Public Trustee.

Mr. Justice Holmes delivered the opinion of the Court.

These are bills in equity in similar form each raising the same question. In each the plaintiff is a German corporation and the interested defendants are the Public Trustee, an English corporation sole appointed to be custodian of enemy property during the late war, and the United States Steel Corporation. Each plaintiff claims one hundred identified shares in the Steel Corporation and seeks to be declared owner of the same, to have new certificates issued to it and the outstanding certificates cancelled on the books of the corporation, and to recover past dividends declared but unpaid. The cases were submitted by them upon an agreed statement of facts, and the District Court after a discussion that leaves nothing to be added dismissed the bills. The decree declared the Public Trustee to be entitled to the shares and directed the Steel Corporation to issue new certificates to his nominee on surrender of the old ones properly endorsed. 300 Fed. 741.

As is usual with shares which it is desired to deal in abroad these shares were registered by tens on the Steel Corporation's books in the name of some well-known broker or the like domiciled in England, and the assignment and power of attorney to transfer the shares printed on the back of the certificate was signed by the broker in blank so that the certificate passed from hand to hand. The Disconto-Gesellschaft had bought a hundred shares and held the certificates thus indorsed in its London branch. The Bank für Handel had bought the same number and pledged them with an English banking house in a running account. On March 27, 1918, an order of the Board of Trade in pursuance of statutory powers purported to vest in the Public Trustee the rights of the

Disconto-Gesellschaft to the shares and the right to take possession of the documents of title. On April 30, 1917, a similar order had been made as to the Bank für Handel's stock. The Public Trustee thereupon seized the certificates in London as was regular and lawful under the laws of England while the war was going on and freed the pledged securities from the lien upon them by a sale of other stocks. He claims a title confirmed by the Treaty of Berlin and the Treaty of Versailles. The plaintiffs set up that a decree recognizing his title would deprive them of their property without due process of law.

The appellants, starting from the sound proposition that jurisdiction is founded upon power, overwork the argument drawn from the power of the United States over the Steel Corporation. Taking the United States in this connection to mean the total powers of the Central and the State Governments, no doubt theoretically it could draw a line of fire around its boundaries and recognize nothing concerning the corporation or any interest in it that happened outside. But it prefers to consider itself civilized and to act accordingly. Therefore New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of

outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. *Yazoo & Mississippi Valley R. R. Co.* v. *Clarksdale,* 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law.

If the United States had taken steps to assert its paramount power, as in *Miller* v. *Kaliwerke Aschersleben Aktien-Gesellschaft,* 283 Fed. 746, a different question would arise that we have no occasion to deal with. The United States has taken no such steps. It therefore stands in its usual attitude of indifference when title to the certificate is lawfully obtained. There is no conflict in matter of fact or matter of law between the United States and England and therefore *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, does not apply. We deem it so plain that the Public Trustee got a title good as against the plaintiffs by the original seizure that we deem it unnecessary to advert to the treaties upon which he also relies or to the subsequent dealings between England and Germany showing that both of those nations have assumed without doubt that the Trustee could sell the stock. We think it unnecessary also to repeat what was said below as to the possibility of the United States making a claim at some future time.

Decree affirmed.

THE STATE OF NEW MEXICO *v.* THE STATE OF COLORADO.

IN EQUITY.

No. 12 Original. Argued December 2, 3, 1924.—Decided January 26, 1925.

1. A line surveyed and marked in 1868 as the location of the parallel designated as the common boundary of the Territories, and later the States, of Colorado and New Mexico, was adopted and recognized by the United States as the true location and boundary, both during the existence of the two Territories and thereafter while New Mexico remained a Territory and Colorado was a State; it was likewise accepted and relied on by the State of Colorado from her admission in 1876, and by the State of New Mexico from her admission, in 1912, until she brought this suit against Colorado in 1919, wherein she claimed that another survey and location, made in 1903 under an appropriation from Congress, and which had been accepted by the General Land Office from 1904 to 1908, and approved in 1908 by a joint resolution of Congress which was vetoed by the President, should be established as the true location of the boundary.

Held: (*a*) That New Mexico, upon her admission as a State, was bound by the previous recognition and adoption of the earlier location by the United States, her predecessor, and could not be heard to disavow the boundary thus recognized. P. 41.

(*b*) The effect of this recognition of the earlier location by the United States was not impaired by the temporary recognition of the later one by the General Land Office. *Id.*

(*c*) After Colorado's admission as a State, her right to rely upon the boundary previously established could not be impaired by any subsequent action of the United States. *Id.*

(*d*) New Mexico was bound also by her own recognition and adoption of the earlier line upon and after her admission to statehood. *Id.*

2. The boundary between the States of Colorado and New Mexico is the line of the 37th parallel as surveyed and marked by Darling from the Macomb monument westwardly to the 109th Meridian, and as surveyed and marked by Major and Preston from the said Macomb monument eastwardly to the Preston monument on the 103rd or Cimarron Meridian. P. 39.

THIS was an original suit brought in this Court by the State of New Mexico against the State of Colorado to settle a controversy over their common boundary. New Mexico's bill was dismissed and a decree was directed, under Colorado's cross-bill, for a resurvey and remarking of the line found by the Court to be the true one, in accordance with Colorado's contention.

Mr. Frank W. Clancy, for complainant.

First, it is clear that the later, or Carpenter, survey is as good as can be made.

Second, the earlier, Darling, survey is inaccurate, defective, and in part a work of pure fiction.

Third, the General Land Office must have been thoroughly convinced of the utterly worthless character of the Darling survey, when it directed the making of a new and independent survey of the 37th parallel with an accompanying destruction, as far as possible, of all evidence on the earth's surface of the Darling line.

Fourth, Congress presumably took the same view when it authorized that new survey, and, later, passed a resolution adopting the Carpenter line.

Fifth, New Mexico has not recognized the Darling line as a boundary. It could not acquiesce in such a matter until it became a State, January 6, 1912; and this suit was brought with reasonable diligence thereafter.

Sixth, the United States while recognizing the Darling line for years, only because nobody questioned it, finally repudiated it and tried to destroy it. The recognition was by no means continuous. *Missouri* v. *Iowa,* 7 How. 660, differs widely on the facts and is inapplicable.

Seventh, even the State of Colorado, through its legislature, in 1901, shows a lack of certainty as to the Darling line which it now claims to have recognized ever since 1868.

Messrs. Oliver Dean, Assistant Attorney General of Colorado; *W. C. Williams,* Attorney General, and *Delph*

E. Carpenter, Special Counsel, with whom *Mr. Charles Roach,* Deputy Attorney General, was on the brief, for defendant.

I. The Darling-Major line was established by the United States when both Colorado and New Mexico were Territories and both States are bound by that boundary line. *Missouri* v. *Iowa,* 7 How. 660; *Missouri* v. *Kentucky,* 11 Wall. 395; *Indiana* v. *Kentucky,* 136 U. S. 479; *Alt* v. *Butz,* 81 N. J. L. 156; *Billingsley* v. *Bates,* 30 Ala. 376; *Climer* v. *Wallace,* 28 Mo. 556; *Mayor etc. of Liberty* v. *Burns,* 114 Mo. 426; *Granby Mining etc. Co.* v. *Davis,* 156 Mo. 422; *Arneson* v. *Spawn,* 2 S. Dak. 269; *Goodman* v. *Myrick,* 5 Ore. 65; *Jones* v. *Kimble,* 19 Wis. 429; *Washington Rock Co.* v. *Young,* 110 Am. St. R. 678.

II. The surveys of the Darling-Major line made in 1868 and 1874 are the senior surveys of the boundary line and must prevail over the junior survey made by Carpenter in 1902.

The Carpenter survey is not shown to have been made by proper authority. It was simply a new and independent survey, and does not purport to show the line as originally established.

Original survey of lands, upon the faith of which property rights have been based and acquired, controls over surveys subsequently made which injuriously affect such rights. *Washington Rock Co.* v. *Young,* 29 Utah 108; *Clement* v. *Parker,* 125 U. S. 309.

A subsequent survey cannot alter or control an original survey. When this can be traced or proved it must govern. *Diehl* v. *Zanger,* 39 Mich. 601; *City of Racine* v. *Emerson,* 85 Wis. 80.

III. The Darling-Major line is the boundary between these States by reason of the recognition and acceptance thereof by the Territories and later by the States of Colorado and New Mexico and by the United States from the time of the survey thereof until the time this suit was filed.

New Mexico is not only bound by the acts of the United States in surveying, establishing, monumenting and thereafter recognizing and adopting the Darling-Major line as the true boundary, but is also estopped by the doctrines of long possession, prescription, laches and acquiescence from now asserting a different boundary. *Rhode Island* v. *Massachusetts,* 4 How. 591; *Indiana* v. *Kentucky,* 136 U. S. 479; *Virginia* v. *Tennessee,* 148 U. S. 503; *Louisiana* v. *Mississippi,* 202 U. S. 1; *Maryland* v. *West Virginia,* 217 U. S. 1.

IV. The Carpenter survey has no legal status as a boundary line because it was made without the consent of the State of Colorado, never received the approval of the State, was rejected by Congress and has always been disregarded by every department of the Government of the United States.

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit in equity, within the original jurisdiction of this Court, brought by the State of New Mexico against the State of Colorado, in 1919, to settle a controversy as to the location of their common boundary line. Under the Acts of Congress under which they were admitted into the Union and their respective Constitutions, this is the 37th parallel of north latitude between its intersections with the 103rd and 109th meridians of longitude west from Greenwich.[1]

The only dispute is as to the location of this line. Different surveys have been made. New Mexico alleges in its bill that the true line is that which was surveyed

[1] The 26th and 32nd meridians west from Washington. Colorado: Act of Mar. 3, 1875, c. 139, 18 Stat. 474; Constitution, Art. I. New Mexico: Act of June 20, 1910, c. 310, 36 Stat. 557; Constitution, Art. I, Sec. 2.

and marked by Howard B. Carpenter in 1903, and prays that this be decreed to be the boundary. Colorado, in an answer and cross bill, alleges that the true line is that which was surveyed and marked by Ehud N. Darling in 1868, and extended by John J. Major and Levi S. Preston in 1874 and 1900; and prays that this line be decreed to be the boundary, and that, in so far as necessary, it be restored and remarked.

The case has been heard on evidence taken by examiners, supplemented by a stipulation of the parties. The material facts are these: The Territory of New Mexico was established in 1850,[2] and the Territory of Colorado in 1861.[3] Under the Acts of Congress their common boundary was the 37th parallel, between the 103rd and 109th meridians.

In 1867 Congress made an appropriation for the "survey of the thirty-seventh parallel of north latitude, so far as it constitutes the northern boundary of the Territory of New Mexico."[4] The Commissioner of the General Land Office employed Ehud N. Darling, a surveyor and astronomer, to make this survey. He made the survey in 1868, and filed his field notes in the Land Office. In accordance with his instructions, he adopted as the northeast corner of New Mexico a stone monument that had been established by Capt. J. N. Macomb, an Army Engineer, in 1859, to mark the intersection of the 37th parallel with the 103rd meridian, and, taking this as his beginning point, surveyed and marked the line of the parallel, as determined by astronomical observations and calculations for latitude, westwardly to the 109th meridian, a distance of over 331 miles. As shown by the field notes he established on this line eleven "astronomical monuments," with "mile corners," usually marked

[2] 9 Stat. 447, c. 49.

[3] 12 Stat. 172, c. 59.

[4] 14 Stat. 457, 466, c. 167.

stones, at the end of each mile where the nature of the ground made this possible, otherwise locating the mile corners by triangulation. In 1869 the Commissioner of the General Land Office approved these field notes, and published an official "Map of the Boundary Line between Colorado & New Mexico on the 37th Parallel North Latitude," made in conformity to them.

Several years later the Commissioner of the General Land Office employed John J. Major, a surveyor and astronomer, to survey and mark the remaining portion of the southern boundary of the Territory of Colorado, extending along the 37th parallel to the 102nd meridian. Major made this survey in 1874, and marked the line of the parallel between the Macomb monument and that meridian. The field notes of this survey were filed in the Land Office and approved by the Commissioner.

In 1876 the State of Colorado was admitted into the Union, with the same southern boundary line as that of the Territory.[5]

Some years later the 103rd meridian was established on a line known as the "Cimarron Meridian," intersecting the 37th parallel a short distance east of the Macomb monument. Thereafter the United States Surveyor General employed Levi S. Preston, a deputy surveyor, to resurvey and retrace the north boundary of New Mexico between the Macomb monument and the Cimarron meridian. Preston made this survey in 1900, retracing and remarking this portion of the Major line, and established at the intersection of that line and the Cimarron meridian, about two miles east of the Macomb monument, a sandstone corner since known as the Preston monument. The field notes of this resurvey were filed in the office of the Surveyor General and approved by him.

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[5] President's Proclamation, Aug. 1, 1876, 19 Stat. 664. See note 1, *supra*.

In 1901 the State of Colorado appointed a commissioner to resurvey and remark a portion of its southern boundary line as surveyed and established by Darling, on which one of his astronomical monuments had disappeared and a number of mile corners could not be found.[6] Both the Territory of New Mexico and the Interior Department were invited to join in this resurvey, but neither did so; and it was made by the Colorado commissioner alone.

In 1902 an examiner of surveys in the General Land Office, on an inspection of about sixty miles of Darling's original line, reported that but few of the corners then remained, and that the line was evidently erroneously established between identified monuments; and the Commissioner urged that the entire southern line of Colorado be resurveyed and reëstablished. Thereupon, on the recommendation of the Secretary of the Interior,[7] Congress made an appropriation for "the resurvey and reëstablishment, on the line of the thirty-seventh parallel of north latitude, of the boundary line between the State of Colorado and the Territories of New Mexico and Oklahoma" between the 102nd and 109th meridians.[8] The Commissioner of the General Land Office employed Howard B. Carpenter, a surveyor and astronomer, to make this resurvey. He was not directed to retrace the lines previously established, but to make an independent survey, and was specifically instructed to "obliterate" all evidences of the corners and monuments that had been set by Darling. Carpenter completed this resurvey in 1903, and filed his field notes in the Land Office in 1904. These were approved by the Commissioner. Carpenter sur-

[6] Colorado Laws, 1901, c. 37.

[7] 57th Cong., 1st Sess., H. R. Doc. No. 604.

[8] Act of July 1, 1902, 32 Stat. 552, 574, c. 1351. The 37th parallel was also the common boundary of Colorado and Oklahoma, between the 102nd and 103rd meridians.

veyed an entirely different line from the Darling and Major-Preston lines. His new line commenced on the 109th meridian, at some distance north of the Darling line, and ran for the greater portion of the boundary north of that line, although crossing it shortly before reaching the Macomb monument and running for the remainder of the distance somewhat to the south of the Darling and Major-Preston lines. Taken as a whole, its effect, if established as the boundary, would be to transfer a large strip of territory from Colorado to New Mexico, including the greater portions of one town and two villages, and five post offices. Carpenter established on his new line eight stone astronomical monuments, and mile corners, marked by iron posts, wherever it was practicable; and whenever he found one of Darling's mile corners or astronomical monuments, after noting its location, either destroyed it completely or obliterated the marks upon it.

After the Commissioner's approval of the Carpenter line the General Land Office ceased to recognize the Darling and Major-Preston line as the boundary between Colorado and New Mexico in so far as related to the public lands, as it had theretofore done, and for a time recognized the Carpenter line as the boundary.

In 1908 Congress passed a Joint Resolution accepting the line of the Carpenter survey "as the proper location of the thirty-seventh parallel and the true boundary line" between the States of Colorado and Oklahoma and the Territory of New Mexico.[9] This resolution was, however, vetoed by the President; and no further action was taken by Congress.

After this veto by the President the General Land Office abandoned its recognition of the Carpenter line, and thereafter continued to recognize the Darling and Major-Preston line as the boundary.

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[9] 60th Cong., 2d Sess., Sen. Doc. No. 604.

In 1912 the State of New Mexico was admitted into the Union, with the same northern boundary line as that of the Territory.[10]

In 1917 about forty miles of Darling's original line included in the resurvey that had been made by the Colorado commissioner, were resurveyed and restored under the direction and with the approval of the Commissioner of the General Land Office.

In addition to the foregoing matters the stipulation of the parties recites:—" That, except as may otherwise be shown by the record in this case as now made, for more than thirty years the position of the Darling line, from the Macomb Monument to the . . . 109th meridian of longitude West from Greenwich, remained undisputed and the correctness of its technical execution unquestioned, and, as so established, the said Darling line has been recognized and acquiesced in by the United States, by the Territory and State of Colorado, by the Territory of New Mexico and by the State of New Mexico except as otherwise indicated by the bringing of this suit, and has been and is now recognized and accepted by the Land Department of the United States, in its surveys of the public domain, as the boundary line between Colorado and New Mexico from the Macomb Monument westward, except so far as may otherwise appear (if it does otherwise appear) by the record in this case; that from 1868 to the present time the Territory and later the State of Colorado . . . has claimed and exercised dominion and sovereignty, and now claims the same, over the territory down to the boundary as established by said Darling and no farther; that county lines have been formed, towns and settlements have grown up, school districts, election districts, voting precincts, and land districts and water districts have been created with reference to said

[10] President's Proclamation, Jan. 6, 1912, 37 Stat. 1723. See note 1, *supra.*

line; public officers have been elected, property has been assessed and taxes levied and collected under the authority of the Territory and State of Colorado, and its courts of both civil and criminal jurisdiction have exercised jurisdiction in all places north of said Darling line and the Territory and State of New Mexico has exercised like jurisdiction in all places south of said line; that government postoffice[s] have been established as being in Colorado when north of said line and as in New Mexico when south of said line, and that public land surveys on both sides of said line have been closed thereon, lands have been disposed of, rights acquired and political boundaries in both Colorado and New Mexico have been fixed by reference to said line. That since 1874 the Major survey and marking of the 37th parallel of North latitude . . . westward to the Macomb Monument has been the recognized and accepted South boundary of Colorado between said points and since the acceptance of the Preston survey, retracement and remarking of said line, in the year 1901, said line as remarked and retraced by Preston between said Macomb Monument and the Preston Monument, at the intersection of said parallel with the Cimarron Meridian, has been and now is the recognized and accepted boundary between Colorado and New Mexico at all points between said Monuments."

There is some evidence, of a very general nature, as to the relative correctness of the location of the line of the 37th parallel as established by Darling, Major and Preston, and by Carpenter. It may well be that neither is entirely correct. We have no occasion, however, to determine this question, or to settle the precise location of the parallel line as an original matter, since, upon the uncontradicted facts, it is entirely clear that the line of the parallel as surveyed and marked by Darling westwardly from the Macomb mounment, and by Major and Preston from the Macomb monument to the Preston

monument, must be now taken as the established boundary between the two States.

There is no question as to the portion of this line between the Macomb monument and the Preston monument, since it is expressly agreed that since this line was surveyed by Major in 1874 and resurveyed by Preston in 1901 it "has been and now is the recognized and accepted boundary between Colorado and New Mexico at all points between said Monuments."

The remainder of the line as surveyed and marked by Darling from the Macomb monument to the 109th meridian, must likewise be held to be the recognized and established boundary.

From 1868, when Darling ran and marked the line of the 37th parallel, to 1919, when this suit was brought, a period of more than half a century, his line was recognized and acquiesced in, successively, as the boundary between the two Territories, between the State of Colorado and the Territory of New Mexico, and between the two States. In *Missouri* v. *Iowa,* 7 Howard 660, which involved the location of the boundary line between the two States running with "the Indian Boundary line," it was held that governments are bound by the practical line that has been established as their boundary, although not precisely a true one; and that as the United States before either of the States had been admitted into the Union and after Missouri had been admitted but while Iowa still remained a Territory, had recognized and adopted the line of a certain survey as the "Indian boundary line" and was committed to that line as the boundary of Missouri, Iowa when admitted was bound by the recognition and adoption of that line by the United States, her predecessor, and could not be heard to disavow it as the boundary. So here, the United States, from 1868 to 1876, while still owning the public domain and having paramount jurisdiction as to territorial boundaries, recognized

and adopted the Darling line as the true location of the parallel and the boundary between the two Territories, and thereafter, from 1876 to 1912, while retaining paramount jurisdiction as to New Mexico, recognized this line as the boundary between the State of Colorado and the Territory of New Mexico; and the State of New Mexico on being admitted into the Union was bound by the previous recognition and adoption of this line by the United States, her predecessor, and cannot be heard to disavow the boundary thus recognized. The effect of this recognition of the Darling line by the United States was not impaired by the temporary recognition of the Carpenter line by the General Land Office, from 1904 to 1908. The United States had resumed its recognition of the Darling line several years before New Mexico was admitted as a State. Further, after Colorado had been admitted into the Union in 1876 its right to rely upon the line previously established could not be impaired by any subsequent action on the part of the United States. Thus, after the Land Department has surveyed and disposed of public lands, the rights therein acquired are not affected by corrective surveys subsequently made by the Department. *United States* v. *Investment Co.,* 264 U. S. 206, 212, and cases there cited. And, independently of these matters, New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood. *Missouri* v. *Iowa, supra,* p. 677.

It results that the bill of New Mexico, praying the establishment of the Carpenter line, must be dismissed; and that, under the cross bill of Colorado, the Darling and Major-Preston line must be decreed to be the boundary between the two States.

This boundary line should now be resurveyed and remarked by a commissioner or commissioners appointed by the court; such action to be subject to its approval.

Missouri v. *Iowa, supra,* p. 679; *Indiana* v. *Kentucky,* 136 U. S. 479, 519; *Oklahoma* v. *Texas,* 260 U. S. 606, 640.

The parties may submit within thirty days the form of a decree to carry these conclusions into effect.

Bill dismissed and decree directed under cross-bill.

SWISS NATIONAL INSURANCE COMPANY, LIMITED *v.* THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES.

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

No. 132. Argued November 18, 1924.—Decided February 2, 1925.

1. Where a corporation was an "enemy" within the definition of the Trading with the Enemy Act because doing business in Germany, the enemy status of its property then seized in this country was not changed by a subsequent cessation of such business. P. 44.
2. The fact that an enemy corporation ceased to be an enemy when the war was ended by the Joint Resolution of July 2, 1921, did not entitle it to a return of its seized property; for, by § 12 of the Trading with the Enemy Act, such claims were to be settled by future direction of Congress. *Id.*
3. Clause 1 of § 9–b of the Trading with the Enemy Act, as amended June 5, 1920, c. 241, 41 Stat. 977, which provides for return of seized enemy property whose owner was and remains a "citizen or subject" of a nation other than Germany, Austria, Hungary or Austria Hungary, cannot be construed as including corporations. So *held* in view of the use of "citizen or subject" in other clauses of the section relating only to natural persons, and more particularly because the 6th clause of the same section makes a special classification of partnerships, associations and corporations, allowing return of property if they were and remain entirely owned by subjects or citizens of nations other than those above mentioned. P. 45.
4. Whether the terms "citizen or subject" are broad enough to include corporations depends upon the intent to be gathered from the legislation in which they occur. P. 46.

5. Clause 11 of § 9–b of the Trading with the Enemy Act, added by the amendment of March 4, 1923, c. 285, 42 Stat. 1511, amounts to a legislative construction of clause 1, as above construed. P. 48.

53 App. D. C. 173 (289 Fed. 571) affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District which dismissed the appellant's bill against the Alien Property Custodian and the Treasurer of the United States, to recover securities seized and held under the Trading with the Enemy Act.

Mr. Hoke Smith, for appellant.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

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

This is an appeal from the Court of Appeals of the District of Columbia under Section 250 of the Judicial Code.

The Swiss National Insurance Company filed a bill in equity against the Alien Property Custodian and the Treasurer of the United States in the Supreme Court of the District to recover securities to the value of about one million dollars. These it had before the War deposited in the various state treasuries because required by the state laws as a condition of doing insurance therein. The Alien Property Custodian had seized them in November, 1918, as property of an enemy, under the definition of Section 2, par. (a) of the Trading with the Enemy Act, approved October 6, 1917, c. 106, 40 Stat. L. 411, that the word "enemy" should be deemed to mean and include for the purpose of the Act "any . . . corporations incorporated within any country other than the United States and doing business within" the "territory (including

that occupied by the military and naval forces) of any nation with which the United States is at war." The plaintiff's petition admitted that at the time of the seizure the plaintiff was doing business in Germany, and was then an enemy of the United States under the definition, and that the seizure was lawful. It is further conceded in argument that the stock of the plaintiff corporation was largely held by Germans, and a failure to aver the contrary in the petition makes this fact a part of the case on the motion of defendants to dismiss the bill.

The grounds stated in the bill for its recovery of the securities were threefold—first, that since the seizure the company had ceased to do business in Germany; second, that the war had been officially declared ended, and, third, that by virtue of the amendment of the Trading with the Enemy Act, approved June 5, 1920, c. 241, 41 Stat. 977, the plaintiff became expressly entitled to the recovery sought.

The motion of defendants was granted, and the bill dismissed. The decree of the District Supreme Court was affirmed by the District Court of Appeals.

The first contention, that because the company had ceased to do business in Germany after the seizure the Alien Property Custodian lost his right to continue to hold the property, can not be sustained. A change like this could not take away the status of the seized property as enemy property. The withdrawal from business in Germany might well involve a transfer of something of value from the plaintiff to enemy citizens or subjects and strengthen the enemy resources.

Second, it is argued that as the War ended by Joint Resolution of July 2, 1921, 42 Stat. 105, the plaintiff thereby ceased to be an enemy and was entitled to a return of its property without express legislation giving such a right. It is clear from Section 12 of the Trading with the Enemy Act, 40 Stat. 411, 424, that Congress did

not intend that such a right should exist. One clause of that section provides:

"After the end of the War any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

The argument for the appellant is that when the War ended, it ceased to be an enemy and so the words quoted do not apply to it. This is an impossible construction of the section. After the end of the War, there could be no enemy in the sense in which the appellant argues. The word "enemy" used in Section 12 of course refers to the person who or corporation which fulfilled the definition of an enemy during the war. It follows that the right of the appellant to recover its property must depend on the Congressional direction subsequent to the original Act. This brings us then to the amendment to the Trading with the Enemy Act of June 5, 1920, 41 Stat. 977.

The third argument of the appellant is then directed to the question whether the appellant comes within the classes of enemies given the right to recover their property from the Alien Property Custodian by the 1920 amendment. Section 9, paragraph a, of that amendment provides for a return by order of the President to a person not an enemy claiming an interest in property seized by the Custodian, and, failing such order, allows a suit in equity to recover the property or money due. Par. b gives a similar opportunity to anyone who is the owner of property seized and held by the Custodian, if the President finds the owner to have been in one of eight defined classes at the time of the seizure. The first class among these is:

"A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and [who] is at the time of the return

of such money or other property hereunder a citizen or subject of any such nation or State or free city".

The sixth class is this:

"A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and [which] was entirely owned at such time by subjects or citizens of nations, States or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder."

It is urged for appellant that it is a citizen of Switzerland and is thus included with those favored in the first class. Section 2 of the original Trading with the Enemy Act approved October 6, 1917, c. 106, 40 Stat. 411, and unrepealed provides that: "The word 'person' as used herein shall be deemed to mean an individual, partnership, association, company or other unincorporated body of individuals, or corporation or body politic" and the word "enemy" is declared to be equally inclusive. But there is in the Act and its amendments no such definition of the words citizen or subject. The term citizen or subject may be broad enough to include corporations of the country whose citizens are in question. *Paul* v. *Virginia,* 8 Wall. 168; *Selover* v. *Walsh,* 226 U. S. 112; *Western Turf Association* v. *Greensburg,* 204 U. S. 359. Whether it is so inclusive in any particular instance depends upon the intent to be gathered from the context and the general purpose of the whole legislation in which it occurs. *United States* v. *Northwestern Express Co.,* 164 U. S. 686, 689. The first clause of paragraph b refers to a citizen or subject who may change his nationality which could hardly refer to a corporation. The second and third clauses describing the 2nd and 3rd classes refer to married women and obviously the term citizen or subject in them includes only natural persons. Clause 4

concerns a citizen or subject of Germany accredited to the United States as the wife or child of a diplomatic officer, of course, a natural person. Clause 5 describes a citizen or subject transferred after arrest to the custody of the War Department evidently only a natural person. In clause 6, the subjects or citizens therein referred to are the owners of partnerships, associations or incorporated bodies indicating that they, too, are natural persons. The context would, therefore, seem to show that the words are not used in the paragraph to include more than individuals. Where, as in the amendment to Section 9 of the year before, July 11, 1919, c. 6, 41 Stat. 35, a proviso was intended to include individuals and corporations, the word persons is used in connection with the words citizens or subjects and thus no doubt is left of the inclusive effect of the proviso. The foregoing inferences as to the narrower scope of the term citizen in paragraph b are not conclusive though they are persuasive.

But the strongest and to us the convincing argument that the language of clause 1 of par. b was not intended to include corporations is the especial mention of partnerships, associations and corporations in clause 6 as a different class from that of clause 1 of the same section. That class is partnerships, associations, corporations, who were enemies under the Act because of the business they did in Germany or Austria-Hungary, but whose owners as partners, associates or stockholders were not enemies either at the time of the sequestration or at the time of the return.

It was evidently intended by Section 9–b not to allow any individual enemies to be favored unless they as women only acquired their status as enemies because of marriage to a male enemy, or unless they were diplomatic representatives of the enemy countries, or members of their families, and the property involved was within

the United States because of their diplomatic service, or unless they were enemies interned in the United States during the War and were living in the United States at the time of the return of their property. There was an obvious purpose to exclude all other individual Germans or Austrians from the privileges of the section and it was to carry out this exclusion that clause 6 was drafted to cover especially the subject of corporations, partnerships and associations in which Germans or Austrians should have no interest. It was of a piece with the subsequent provision of the 5th section of the Joint Resolution of July 2, 1921, ending the War (42 Stat. 105, 106, c. 40), designed to retain in custody the property of all German and Austrian nationals deposited with the Custodian in order to aid this country and its nationals in collecting claims for losses against the two enemy governments. The design was further subsequently revealed, though not so closely adhered to, in clause 11, added to Section 9, par. b, by the second amendment to the Trading with the Enemy Act (42 Stat. 1511, 1513, c. 285), by which property could be returned to non-German or non-Austrian corporations provided that Germans or Austrians did not own fifty per cent. of the stock.

Clause 11 of the second amendment was in fact a legislative construction of clause 1 of par. b of Section 9 in the amendment of 1920 as we construe it, because otherwise and according to the contention of the defendants, a non-German or non-Austrian corporation though doing business in Germany or Austria could, under clause 1 and without clause 11, recover its property whatever its stock ownership.

Had no clause 6 been inserted in the Act, possibly the words citizens or subjects of clause 1 might have been held to include corporations; but, with a specification of them as a separate class, it would violate an obviously sound rule to include them by construction in clause 1 also as citizens or subjects.

Much has been said in respect to the intent of Congress to be liberal in this series of acts as shown by the correspondence of the Attorney General and his subordinates with the Congressional Committees; but nothing has been called to our attention that seems to us to have real significance in respect to the exact point in this discussion.

In order to supply some reason or occasion for clause 6, if clause 1 is to be held to include corporations as citizens or subjects, it is suggested for appellants that the clause was intended to cover German and Austrian corporations entirely owned by citizens of the United States or of other countries than Germany or Austria. We think this a far fetched argument to explain the very general words of this clause when such a purpose might have been easily attained by specific provision for such exceptional instances. Under the appellant's construction of clause 6, the improbable overlapping duplication of clause 1 and clause 6 is so manifest that we think the construction must be rejected. We concur, therefore, with the conclusion of the Court of Appeals, and the District Supreme Court.

Affirmed.

MR. JUSTICE McKENNA participated in the consideration of this case and concurred in the opinion prior to his resignation.

The separate opinion of MR. JUSTICE McREYNOLDS.

This cause requires interpretation of Section 9, Trading with the Enemy Act, approved October 6, 1917, c. 106, 40 Stat. 411, 419, as amended by the Act of June 5, 1920, c. 241, 41 Stat. 977, copied below.*

* SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom

Section 2 of the original Act, which has remained unchanged, declares—

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company or other unincorporated body of individuals, or corporation or body politic;" and that the word "enemy" shall be deemed to mean—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war [or an ally of such nation], or resident outside the United

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any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer,

States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war [or an ally of such nation] or incorporated within any country other than the United States and doing business within such territory. . . ."

For many years appellant has been incorporated under the laws of Switzerland. Prior to 1917 and continuously thereafter until 1922 it did an insurance business in Germany. From 1910 until November 18, 1918, it carried on the same business within several of our States, and as security for its obligations deposited many domestic

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assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) *In respect of all money* or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof, at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or

(2) A woman who at the time of her marriage was a subject or citizen of a nation which has remained neutral in the war or of a nation which was associated with the United States in the prosecu-

bonds—a million dollars. On the latter date—a week after the armistice—the Alien Property Custodian took possession of these bonds, and either he or the Treasurer of the United States now holds them. Claiming the sequestered securities or their proceeds under Section 9, Subsection (b), appellant began this proceeding in the Supreme Court, District of Columbia, November 28, 1921. That court held the corporation could not prevail because subjects of Germany held some of its stock; and upon motion dismissed the bill. The Court of Appeals affirmed the decree. The corporation came within the term "enemy" solely because of its business within Germany; but

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tion of said war, and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

(3) A woman who at the time of her marriage was a citizen of the United States (said citizenship having been acquired by birth in the United States), and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was, at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

it is admitted that enemy subjects owned and controlled a majority of the capital stock. Apparently the sequestration was permissible—its propriety after cessation of hostilities is not for our determination.

As an incorporated citizen or subject of Switzerland appellant claims to come within Paragraph (1) of the amended Act—

"(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city."

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(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder; or

(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

(8) The Government of Germany or Austria or Hungary or Austria-Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government. [Or]

(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: *Provided,* That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him hereunder; or

(10) A partnership, association, other unincorporated body of individuals, or corporation, and that it is not otherwise entitled to the

On the other hand the insistence is that although the words "citizen or subject" often include corporations as well as natural persons, this is not necessarily true but depends always upon the intent disclosed by context and other accompanying circumstances. Further, that although corporations would normally fall within the words of Paragraph (1), without more, the contrary intent is disclosed and they are excluded therefrom by the provisions touching certain corporations found in Paragraph (6)—

"A partnership, association, or other unincorporated body of individuals outside the United States, or a

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return of its money or other property, or any part thereof, under this section, and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000, is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: *Provided*, That no insurance partnership, association, or corporation, against which any claim or claims may be filed by any citizen of the United States with the Alien Property Custodian within sixty days after the time this paragraph takes effect, whether such claim appears to be barred by the statute of limitations or not, shall be entitled to avail itself of the provisions of this paragraph until such claim or claims are satisfied; or

(11) A partnership, association, or other unincorporated body of individuals, having its principal place of business within any country other than Germany, Austria, Hungary, or Austria-Hungary, or a corporation, organized or incorporated within any country other than Germany, Austria, Hungary, or Austria-Hungary, and that the control of, or more than 50 per centum of the interests of voting power in, any such partnership, association, other unincorporated body of individuals, or corporation, was at such time, and is at the time of the return of any money or other property, vested in citizens or subjects of nations, States, or free cities other than Germany, Austria, Hungary or Austria-Hungary: *Provided, however*, That this subsection shall not affect any rights which any citizen or subject may have under paragraph (1) of this subsection;—

Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery

corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder."

Also, that the purpose to exclude corporations from Paragraph (1) is further accentuated by the legislative construction disclosed by Paragraph (11), adopted March 4, 1923, c. 285, 42 Stat. 1511, 1513—

"(11) A partnership, association, or other unincorporated body of individuals, having its principal place of

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of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian:

Provided, That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory of any one of the following nations: Germany, Austria, or Hungary, shall be deemed

business within any country other than Germany, Austria, Hungary, or Austria-Hungary, or a corporation, organized or incorporated within any country other than Germany, Austria, Hungary, or Austria-Hungary, and that the control of, or more than 50 per centum of the interests or voting power in, any such partnership, association, other unincorporated body of individuals, or corporation, was at such time, and is at the time of the return of any money or other property, vested in citizens or subjects of nations, States, or free cities other than Germany, Austria, Hungary or Austria-Hungary: *Provided, however,* That this subsection shall not affect any rights which any citizen or subject may have under Paragraph (1) of this subsection."

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to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

(c) Any person whose property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

(d) Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then

The proviso of Paragraph (11) sufficiently repels the suggestion that it restricts Paragraph (1)—"This subsection [paragraph] shall not affect any rights which any citizen or subject may have under Paragraph (1) of this subsection."

Reporting, June 21, 1917, (H. Rep. 85, 65th Cong., 1st Sess.), the House Committee on Interstate and Foreign Commerce recommended passage of the original Trading with the Enemy Act, and said—

"The chief objects of this bill are (1) to recognize and apply concretely, subject to definite modifications, the principle and practice of international law interdicting trade in time of war, and (2) to conserve and utilize upon

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his legal representative may proceed for the return of such property as provided in subsection (a) hereof: *Provided, however,* That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or otherwise, as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

(g) This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof.

a basis of practical justice enemy property found within the jurisdiction of the United States. . . . Citizens cannot be permitted directly or indirectly to augment the material resources of the enemy by commercial intercourse, and the necessity for this interdiction is more obvious today than at any period of the world's history. Never were the industrial, commercial and financial resources of belligerent nations so vital to the success of war as now. It is not extravagant to affirm that the effective organization of these resources is more likely to determine the result of the present conflict than armies and navies. Therefore, everything reasonably possible should be done to prevent our enemy from reaping the advantages of commercial transactions with the people of the United States. To summarize, the purpose of the bill is not to create new international rules or practices, but to define and mitigate them."

In a favorable report on the same measure, August 31, 1917, (S. Rep. 113, 65th Cong., 1st Sess), the Senate Committee on Commerce said—

"The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on. It also provides for the care and administration of the property and property rights of enemies and their allies in this country pending the war. The spirit of the Act is to permit such business intercourse as may be beneficial to citizens of this country, under rules and regulations of the President, which will prevent our enemies and their allies from receiving any benefits therefrom until after the war closes, leaving to the courts and to future action of Congress the adjustment of rights and claims arising from such transactions. Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails

at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it; also to allow such business as fire insurance, issuance and use of patents, etc., to be carried on with our enemies and their allies, provided that none of the profits arising therefrom shall be sent out of this country until the war ends."

The intent to conserve and utilize enemy property upon a basis of practical justice and to prevent the owners from receiving benefits therefrom until after the war, but without ultimate confiscation, is clear. And, where the words permit, the statute and its amendments should be liberally interpreted to that end.

By executive orders the President vested certain wide powers, conferred upon him by the Trading with the Enemy Act, in the Alien Property Custodian; and that officer diligently proceeded to sequestrate property which, as he held, belonged to enemies. See *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 567; *Stoehr* v. *Wallace,* 255 U. S. 239, 245; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56. Reporting to the President, February 22, 1919, (Senate Doc., vol. 8, pp. 9, 13) the Custodian said—

"At the close of business on February 15, 1919, 35,400 reports of enemy property had been received. The property of each enemy person is treated in the office as a trust and administered by an organization which is built upon the general lines of a trust company. The number of separate trusts now being administered amounts to 32,296 [at one time, it is said, they amounted to 50,000—Senate Hearing, S. 3852, July 27, 1922, p. 21], and have an aggregate value of $502,945,724.75. About 9,000 of these cases are covered by reports in which the administration has not yet reached the stage of valuation. When the entire number of trusts reported shall have been finally opened on the books and the readjustment of values consequent upon appraisal shall have been com-

pleted, it is safe to say that the total value of the enemy property in the hands of the Alien Property Custodian will reach $700,000,000. . . .

" The legislative intent was plainly that all enemy property, concealed as well as disclosed, should be placed entirely beyond the control or influence of its former owners, where it cannot eventually yield aid or comfort to the enemy directly or indirectly. Until the peace terms are finally signed and the ultimate disposition of enemy property determined by the act of Congress, it shall be the firm purpose of the Alien Property Custodian to carry out the will of the Congress in respect thereto. Neither litigation nor threat of litigation ought to be interposed to stay that purpose."

During hostilities and thereafter he sequestered the property of enemy subjects, of citizens of the United States, of associated nations and of neutrals, found in the Philippine Islands, the Hawaiian Islands, the Virgin Islands, Porto Rico, and throughout continental United States. It included practically all forms of tangible and intangible assets—industrial plants, chemical and woolen mills, steamship lines, banks, land and cattle companies, salmon factories, mines of gold, silver and other metals, corporate bonds and shares of stock, real estate, trusts represented by securities, liquid assets, thousands of patents (5700), trade-marks, prints, labels and copyrights, etc., etc. The individual items varied in value from one dollar to thousands, even millions of dollars. The enactment was novel, and gave rise to many troublesome questions of fact and law.

After the conclusion of hostilities insistent demands were made for return of the property belonging to citizens of the United States, of associated powers, of neutrals, and of the states partly composed of territory detached from Germany or Austria.

The Act of July 11, 1919, c. 6, 41 Stat. 35, added to Section 9 a proviso which gave right of recovery to sub-

jects of associated nations whose property had been sequestrated solely because of residence within territory occupied by enemy forces, e. g., Belgium and Northern France. There were several hundred cases of French and Belgian property taken solely because the owners were in such occupied territory. [H. Comm. Hearings 1920, vol. 232–1, part 8, p. 11.] This amendment (copied in the margin *) applied to " a *person* who was an enemy or ally of enemy " and " is a *citizen or subject* of such associated nation." The words " citizen or subject " include " person," and " person," according to the statutory defi-

* *Provided, however,* That in respect of all property heretofore determined by the President to have been held for, by, on account of, or on behalf of, or for the benefit of a person who was an enemy or ally of enemy, if the President, after further investigation, shall determine that such person was an enemy or ally of enemy solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary, or their allies, and that such person is a citizen or subject of such associated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said enemy or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian. And the receipt of the said enemy or of the person by whom said property was conveyed, transferred, assigned, or delivered to the Alien Property Custodian, shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States as the case may be, and of the United States in respect of all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

nition, includes "corporation." The same meaning of "citizen or subject" should be accepted wherever they occur in the section.

March 31, 1920, the Attorney General advised the House Committee on Interstate and Foreign Commerce (H. Rep. 1089, 66th Cong., 2nd Sess.)—

"The Secretary of State has written to me that this Government has recognized that the provinces of Alsace and Lorraine have now become a part of France and that, in his opinion, the continued retention by the Alien Property Custodian of property of residents of these provinces who have acquired French nationality under the Versailles treaty of peace cannot fail to have an unfavorable effect upon the relations of the United States and France. The Secretary of State expressed the view that the Trading with the Enemy Act should be so amended as to allow the return of this property. He suggested that I recommend to Congress an amendment to this effect.

"The Secretary of State also points out that this Government has recognized the Republics of Poland and Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes, and that for this Government to retain the property of persons who are citizens of those countries and resident within their borders would have a prejudicial effect upon the relations between the countries in question and the United States. The Secretary of State's recommendation was that any amendment to the Trading with the Enemy Act should be broad enough to authorize the return of property belonging to citizens of these countries. He also felt that the amendment should cover the cases of residents of territory which may be allotted, under treaties yet to become effective, to an allied or associated power (as, for example, Trieste), as well as territory which, under plebiscites to be held in accordance with treaty provisions, may be allotted to a neutral country (as, for example, that portion of Schleswig which may be allotted to Denmark).

"I am herewith forwarding to you a draft of a bill to amend Section 9 of the Trading with the Enemy Act, which I believe will provide the relief requested by the Secretary of State."

May 5, 1920 (H. Rep. 1089, 66th Cong., 2nd Sess.), the Secretary of State wrote to the Attorney General—

"I have the honor to refer to my letter of March 23, 1920, concerning an amendment to Section 9 of the Trading with the Enemy Act, authorizing the release of property taken over by the Alien Property Custodian belonging to enemy persons who, by virtue of the peace treaties, become citizens, subjects or nationals of countries other than Germany, Austria or Hungary. In addition to the classes of property referred to therein, I believe that any amendment to Section 9 should also contain provisions permitting the return of all property which, at the time it was taken over by the Alien Property Custodian, belonged to nationals, citizens or subjects of the United States, as well as those of neutral or friendly states and of Turkey and Bulgaria.

"The various neutral and allied states whose nationals' property has been taken over by the Alien Property Custodian by reason of their residence in enemy or ally of enemy territory, or otherwise, for some time have been pressing for the release of such property. It appears that the Department of Justice has ruled that, under the Trading with the Enemy Act in its present form, it is not in a position to release this property. During the actual conduct of hostilities, it may have been advisable to retain such property. In view, however, of the cessation of hostilities, this Department feels that the government should no longer retain this property, even though a technical state of war may still exist. To do so would undoubtedly create an unfavorable impression in the states concerned, and would be of no advantage to the United States in its negotiations with enemy countries."

Enclosing the letter last quoted, the Attorney General wrote again to the House Committee, May 11, 1920 (H. Rep. 1089, 66th Cong., 2nd Sess.)—

"Referring to my letter of March 31, concerning certain legislation amendatory to Section 9 of the Trading with the Enemy Act to be submitted to your committee at the suggestion of the Secretary of State, as stated to you in my letter of April 22, through inadvertence the draft of the proposed legislation was not enclosed in the letter of March 31, and thereafter the Secretary of State requested that the matter be held up so that certain additional relief, which he considered necessary to give, might be incorporated in the proposed amendment. These suggestions he has since furnished to me, and the inclosed draft of a bill, amending Section 9, has been drawn with a view to meeting these suggestions. I am also enclosing a copy of his letter to me, dated May 5, 1920, in order that your committee may have the benefit of the information which it contains.

"The relief called for by this letter required extensive changes in the text of the bill which was designed to accompany my letter of March 31, and accordingly I will reanalyze its provisions, and indicate the change which it would make in existing law. . . .

"Subsection (b) of the proposed amendment provides, in substance, for the return of all enemy property, except that held by persons who are in fact bona fide subjects or citizens of Germany, Austria or Hungary."

May 21, 1920, the Secretary of State sent the following to the same Committee (H. Rep. 1089, 66th Cong., 2nd Sess.)—

"The Attorney General has informed me that on May 11, 1920, he submitted to you a draft of an amendment to Section 9 of the Trading with the Enemy Act, permitting the return of property taken over by the Alien Property Custodian belonging to citizens or subjects of neutral

states and states associated with this government in the World War, as well as to persons who have or will, in pursuance of treaty provisions, become citizens or subjects of such states, for example Alsace-Lorraine, or citizens or subjects of new states which have been recognized by this government, such as Poland and Czechoslovakia.

"The draft, it is understood, is largely based on representations from this Department, made in view of the fact that the Attorney General holds that under the Trading with the Enemy Act, in its present form, he is unable to release property to owners, who when it was taken over were included, for any reason, in the terms 'enemy' or 'ally of enemy,' as used in the Act, and consequently, in spite of strong representations by various neutral and associated governments, it has been impossible to return the property of their nationals, which it would appear this government should no longer retain. To longer retain property of this character can hardly fail to unfavorably affect the relations of this government with the governments concerned, and I am strongly of the opinion that Section 9 of the Act should be amended at an early date, so as to permit in proper cases the return of such property. I hope that it will be possible to give favorable consideration to the matter, and that an amendment of the Act can be passed before the recess of Congress."

The House Committee held protracted hearings (H. Comm. Hearings 1920, vol. 232-1, part 8); and heard representatives of the State Department, the Attorney General's Office and the Alien Property Custodian, who stated what had been done and pointed out the purpose of the proposed amendments. The following is quoted from statements of Mr. Hill, Assistant to the Solicitor, State Department, and Mr. Boggs, Special Assistant to the Attorney General.

"The Chairman. [Mr. Hill,] does the seizure and retention of this property, by the Alien Property Custodian, of citizens of Czechoslovakia, Jugo-Slavia, Bulgaria, Turkey and Alsace-Lorraine, involve any embarrassment on the part of the State Department?

"Mr. Hill. It does; yes, sir. In addition to that, they have taken the property of citizens of Switzerland, Holland and other neutral countries, who at the time by reason of residence in Germany or otherwise, were included in the term 'enemy.' We have taken over that property, and under the present wording of the Act the Custodian cannot release it, and the Attorney General cannot upon application act favorably, because it was, technically, enemy property at the time. We have a number of cases of that kind and they are causing a great deal of embarrassment.

"I may also refer to the case of Czechoslovakia. This government has recognized the government of Czechoslovakia. Congress made an appropriation for a minister to that country and we have accredited a minister there. This government has recognized the existence of that country through the Executive, and yet we continue to hold the property of its citizens, which we cannot release at this time without an amendment of the Act, because they were enemies at the time the property was taken over. The Czechoslovakian government has pressed us a good deal for the return of that property. Conditions in Czechoslovakia, Poland, Jugo-Slavia, etc., are very serious and the return of their citizens' property, in view of the very advantageous rates of exchange at this time, would be of material assistance in the rehabilitation of those countries.

"Take the case of Poland; the same situation exists there. We have a great deal of Polish property. Where the Poles were residing in that part of Poland which was formerly Austria-Hungarian or German territory, the de-

partment has been very much embarrassed because there is no discretion with the Attorney General to return such property. There has been considerable irritation shown by the various neutral countries and considerable pressure by these new associated states, such as Poland and Czecho-slovakia and also Jugo-Slavia, which is a part of the Kingdom of the Serbs, Croats and Slovenes. We continue to hold the property of their citizens, although they were our associates during the war.

"Mr. Denison (of the committee). Under the terms of this bill can that situation be met in the case you referred to of citizens of Sweden and Norway?

"Mr. Hill. Paragraph 1 on page 4 permits the return of property of 'a citizen or subject of any nation or state or free city other than Germany or Austria or Hungary or Austria-Hungary (including any state or free city in the four nations last named).' That would permit the return of such property."

"Mr. Dewalt (of the committee). [Mr. Boggs,] does the proposed Act have in contemplation the cases of residents of Alsace-Lorraine, occupied territory?

"Mr. Boggs. Yes, sir.

"Mr. Dewalt. How do you protect them and what rights do they receive under this act?

"Mr. Boggs. That refers to subdivision No. 1 of subsection *b*, contained on page 4 of the present draft. 'A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary'—as it now reads—'(including any State or free city in the four nations last named), and is at the time of the return of his money or other property hereunder a citizen or subject of any such nation or State or free city.'

"Now, that would permit the return to a person who was not a citizen at the time the property was taken and is not now a citizen of one of the enemy countries. In order to clarify the situation with regard to Alsace-Lor-

raine and other countries that have been transferred from enemy to nonenemy or friendly status, by virtue of the war, there has been inserted the proviso" [to Section 9 quoted above].

The foregoing letters and statements indicate the complicated situation which followed common acceptance of the Treaty of Versailles and failure by the United States to end the technical state of war until July 2, 1921 (c. 40, 42 Stat. 105). They reveal the desire of the Executive Departments for prompt return of sequestered property not owned by bona fide subjects or citizens of Germany or Austria-Hungary, and their interpretation of the proposed enactment. Paragraphs (1), (4), (6), (7) and (8) of subsection (b) apparently originated with the State Department. The House Committee made a favorable report upon the bill, accompanied by these letters (H. Rep. 1089, June 2, 1920, 66th Cong., 2nd Sess.), and among other things said—

"The bill has the approval of the Departments of Justice and State, as will appear by the letters attached and which are made a part of this report. . . .

"The United States, while holding approximately $556,000,000 worth of private property which it found in this country belonging to individual citizens of enemy countries residing in their country at the outbreak of the war and still residing there, does not intend to confiscate this property. It was the intention of Congress when the property was taken that it should merely be held in custody during the war and that after the war the property or its proceeds should be returned to the owners. It has never been the purpose or the practice of the United States to seize the private property of a belligerent to pay our government's claims against such belligerent. Such practice is contrary to the spirit of international law throughout the world. The reasons for the enactment of the pending measure are clearly set forth in the accompany-

ing communications received from the Attorney General and the Secretary of State. For the reasons set forth in the letter of the Secretary of State prompt and favorable action is urged in order that the State Department may be relieved of some embarrassment in its dealings with some countries of Europe. For these reasons the committee favorably reports the bill as above amended."

The House (Cong. Rec. vol. 59, part 8, p. 8429) passed the bill shortly after this report, and within a few days thereafter the Senate took like action (*id.* 8475). The manifest design was to restore certain property in compliance with the original purpose of Congress.

The amending statute re-enacted the material provisions of original Section 9 as Subsection (a), and added six subsections—(b), (c), (d), (e), (f) and (g). It deleted the proviso of July 11, 1919, concerning persons in occupied territory, and inserted a general proviso applicable to the whole section, which directs that no *person* shall be deemed or held to be *citizens or subjects* of Germany or Austria-Hungary who had been or should become citizen or subject of any state or nation partly composed of territory once held by either of those empires.* " Person," of course, includes corporation, and thus, in the section now to be construed, " citizen or subject " clearly include corporations and have their true and normal meaning.

* No person shall be deemed or held to be a citizen or subject of Germany, or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be

Behn, Meyer & Company v. *Miller* 266 U. S. 457, considers Section 9, and declares—

"Subsection (a) of Section 9 gives now, as the same words gave from the first, the right of recovery to any person never 'an enemy or ally of enemy,' within the statutory definitions. . . . Subsection (b) adds to those allowed to recover from the first a considerable number always within the definition of 'enemy' and affords to them the measure of relief which Congress deemed proper long after peace had been actually restored. . . . Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. . . .

"Section 7, Subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (Sec. 2) of 'enemy' and 'ally of enemy' by the words 'Any corporation incorporated within such territory of any nation with which the United States is at war [or any nation which is an ally of such nation] or incorporated within any country other than the United States and doing business within such territory.'"

We there pointed out that under the Act a corporation is an entity with character of its own irrespective of the status attributed to stockholders, and is "enemy" only when directly within the statutory definition. The theory that all corporations are excluded from Subsection (a)

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concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part).

because some are specifically mentioned in Subsection (b), Paragraph (6), was definitely rejected; and we held that a corporation of the Straits Settlements (British in character) which had never done business in enemy territory did not come within the definition, although German nationals owned the controlling interest.

In his letter of May eleventh the Attorney General expressed the view that Subsection (b) provided "for the return of all enemy property, except that held by persons who are in fact bona fide subjects or citizens of Germany, Austria or Hungary;" and the Secretary of State thought that it permits the "return of property taken over by the Alien Property Custodian belonging to citizens or subjects of neutral states, and states associated with this government in the World War, as well as to persons who have or will, in pursuance of treaty provisions, become citizens or subjects of such states, for example, Alsace-Lorraine, or citizens or subjects of new states which have been recognized by this government, such as Poland and Czechoslovakia."

The eight paragraphs of Subsection (b) are separated by "or," and owners of seized property who are within any described class may recover. Every paragraph adds some owners, and none restricts another by express words. The apparent purpose was to relieve any owner *if* within *any* paragraph—not to mark out inclusive and exclusive classes.

Paragraph (1) is broad enough to include the property of all neutrals, and so to interpret it will do no violence to any part of the Act. The words "citizen or subject," as commonly used in international matters, include corporations. *Paul* v. *Virginia,* 8 Wall. 168, 177, 178; *United States* v. *Northwestern Express Co.,* 164 U. S. 686, 689; *Ramsey* v. *Tacoma Land Co.,* 196 U. S. 360, 362; *Moore's International Law Digest,* vol. III, p. 804; vol. VI, pp. 641, 642.

Corporations of neutral countries, although controlled by enemy stockholders, were never declared to be "enemy" unless they did business within hostile territory; the statute gave no regard to residence or nationality of stockholders. Such business also made enemies of neutral individuals; and they can recover under Paragraph (1). Hostilities having ended, neutral nations could properly demand the same right for their corporations. Confiscation is everywhere disavowed; neutral property may not be used for adjusting claims against belligerents; and ordinary fair dealing requires its release. To seize the effects of a neutral corporation after cessation of hostilities and then hold them solely because of some enemy stockholder, would defeat the lawmakers' honorable intention and give rise to grave suspicion concerning the purpose of our government. On the argument counsel for appellees admitted that the view which he advocated would prevent return of the sequestered property of a corporation organized under the laws of a neutral nation if a German subject owned a single share of the stock—if, indeed, he owned less than one per cent., while Americans or neutrals held the remainder. This unfortunate, if not absurd, result indicates the unsoundness of the proposed construction.

Paragraphs (2) and (3) add certain women who married enemy nationals; (4) and (5) add diplomatic and consular officers and interned persons; (7) and (8) make further definite additions.

Paragraph (6) adds to those already described, "a partnership, association, or other unincorporated body of individuals outside the United States" (Germany and Austria-Hungary are outside); also "a corporation incorporated within any country other than the United States (this includes Germany and Austria-Hungary) and was entirely owned at such time by subjects or citizens of nations, States or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at

the time of the return of its money or other property hereunder." This includes corporations of Germany or Austria-Hungary, or of any state left within those empires,* if entirely owned by citizens of the United States or an associated power or a neutral. The practice of organizing local companies to do the business of foreign owners has become very general. Certain important German corporations were wholly owned by individuals or corporations of the United States. British subjects had large investments in German concerns; and probably the same is true of subjects of Sweden, Norway, Holland, Denmark, Switzerland and Italy. There were obvious reasons for releasing property of a corporation when wholly owned by our own people, by nationals of associated powers, or by neutrals; and Paragraph (6) effects this.

Consider—

That the purpose of the original Act was to provide for the care and administration, pending the war, of property which might be helpful to our enemies, and to deprive the owners of its use " until the war closes."

That no corporation was declared " enemy " because of the nationality of stockholders, but only when incorporated within enemy territory or doing business there.

That property of Americans, of citizens of associated nations and of neutrals was sequestered because of residence or business carried on within enemy countries.

That although appellant had been permitted to do business within the United States during the whole period of

* German Civil Code (1900)—

Sec. 22. An association whose object is the carrying on of an economic enterprise acquires juristic personality, in the absence of special provisions of Imperial law, by grant from the State. The power to make such grant belongs to the State in whose territory the association has its seat.

Sec. 23. An association whose seat is not in any State may, in the absence of special provisions of Imperial law, be granted juristic personality by resolution of the Federal Council.

actual hostilities its property was seized after the armistice when such property could not be utilized for hostile purposes.

That the Act of 1919 permitted return of property of any " person " (this includes corporation) then a " citizen or subject " of an associated power treated as "enemy" solely because of residence within enemy lines.

That after the armistice our Executive Departments represented to Congress the urgent demands for sequestered property of citizens and subjects of associated nations, neutrals, and states composed in part of territory formerly within Germany or Austria-Hungary, and reported the impending deleterious effect upon our foreign relations.

That the agents of the State Department and the Attorney General's office pointed out that the amendments proposed by them provided, " in substance, for the return of all enemy property except that held by *persons* who are in fact bona fide subjects or citizens of Germany, Austria or Hungary."

That a general proviso applicable to *all* of Section 9 directs that, for its purposes, " no *person* shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary," if he becomes the subject of any nation composed in part of territory formerly belonging to those empires, and it extends relief to such persons. The words " citizen or subject," as there used, clearly include " persons," and, by statutory definition, the latter includes a corporation.

That the original seizure of the property in question would be difficult to justify; and certainly the United States can have no moral right longer to retain or to confiscate it. Neutral property cannot be used in settlement of claims against enemy countries. So to do would be wholly inconsistent with our traditions and pretensions.

That the words "citizen or subject of any nation," in Paragraph (1), according to common usage, are broad enough to include corporations.

That the use of the disjunctive "or," in separating the paragraphs of Subsection (b), indicates that if an owner comes within the description of any class he may recover. The fact that he falls within more than one is not material.

That Paragraph (6) describes a class of owners not within the words of Paragraph (1) and affords possible relief, obviously desirable, for our own citizens, associates and neutrals.

That a liberal construction should be given the amendment with a view to carrying out its benevolent purposes, and not a narrow, strained one which would reflect discredit upon the Government.

That the construction asked by appellees is neither natural nor necessary and would lead to the unfortunate conclusion that seized property of a neutral corporation must be retained because a German owns one share out of many thousand. Without doing violence to any part of the Act and by giving effect to every word therein, citizens of neutrals may secure just relief and the United States escape the serious charge of oppressive and unfriendly action.

In view of all these things, I am unable to accept the view which appellees urge upon us. It seems sufficiently plain that the court below fell into error; and to affirm the challenged decree would leave our Government in a most unenviable position. "There is no debt with so much prejudice put off as that of justice."

STANDARD OIL COMPANY OF NEW JERSEY, AS OWNER, ETC., OF THE STEAMSHIP LLAMA, *v.* THE UNITED STATES OF AMERICA.

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

No. 169. Argued January 14, 1925.—Decided February 2, 1925.

1. A vessel insured by the United States against "takings at sea, arrests, restraints and detainments of all kings, princes, and peoples," etc., "and all consequences of hostilities or war-like operations," was stopped by a British war ship and boarded by a British naval officer with armed men; her navigation was resumed by her master, but under the general control of the officer; she struck a rock and was lost. *Held* that the proximate cause was the seizure and paramount control (insured against), and not the marine peril. P. 77.
2. When the United States goes into the business of insurance (Act of Sept. 2, 1914, c. 293, § 5,) issues policies in familiar form and provides that, in case of disagreement, it may be sued, it must be assumed to have accepted the ordinary incidents of suits in such business, including the payment of interest. P. 79.

291 Fed. 1, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing a decree of the District Court awarded against the United States, as respondent, in a libel on two war risk insurance policies, issued under the War Risk Insurance Act of September 2, 1914.

Mr. Cletus Keating, with whom *Mr. John M. Woolsey* was on the brief, for petitioner.

Mr. J. Frank Staley, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Albert Ottinger,* Assistant Attorney General, were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a libel upon two policies of insurance issued by the Government insuring respectively the steamship Llama and her freight and advances against war risks.

Act of September 2, 1914, c. 293, § 5; 38 Stat. 711, 712. The libellant recovered in the District Court, but the decision was reversed by the Circuit Court of Appeals. 291 Fed. 1. A writ of certiorari was granted by this Court. 263 U. S. 694.

The risks assumed by the insurer in the two policies included "takings at sea, arrests, restraints and detainments of all kings, princes, and peoples, of what nation, condition or quality soever, and all consequences of hostilities or war-like operations, whether before or after declaration of war." The loss happened as follows. On October 14, 1915, the Llama sailed from New York for Copenhagen with a cargo of oil, routed via Kirkwall that her papers might be examined. On October 29 she was stopped by the British warship Virginia and was boarded by a lieutenant and four men, all armed, and her papers examined. The result was signalled to the Virginia and the lieutenant directed to proceed to Kirkwall, which was 400 miles to the east on the farther side of the Orkneys, keeping to the northward of Scule Skerry and North Rona and not to pass between the islands at night. The steamer arrived off Westray Firth, one passage between the islands, on the night of October 30. The next morning it started on a course through Westray Firth but in a few hours struck a rock and was totally lost.

In defense it is argued that the proximate cause was a marine peril not covered by the policies and that the decision should be governed by *Morgan* v. *United States,* 14 Wall. 531; *Queen Insurance Co.* v. *Globe & Rutgers Fire Ins. Co.,* 263 U. S. 487, and other similar cases. But in those very strict applications of a well-known rule, however strong the motives of the insured or owners for acting as they did, the loss ensued upon their own conduct. But if a vessel should be taken from an owner's hands without his consent and should be lost while thus held by a paramount power, obviously a company that had insured

against such a taking could not look beyond and attribute the loss to a peril of the sea. Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a nonconductor between the insured and subsequent events. See *Muller* v. *Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759, 763. *Cory* v. *Burr*, 8 App. Cas. 393, 398. *Andersen v. Marten*, [1908] A. C. 334.

The Llama at the time of the accident was under the paramount control and in the possession of the Virginia. We regard the differences between the testimony of the British officer and that of the master of the Llama as immaterial. The master, who was believed in the District Court, makes the intervention of the British lieutenant frequent, active, and the cause of a change of the course that the ship otherwise would have taken. But whether the intervention was more or less, if by mutual understanding, after a manifestation of armed force, the last word was with the lieutenant, it does not matter whether he uttered his commands often or rarely. The lieutenant while denying that he had a general charge of the navigation testifies again and again to facts that show that he assumed and was recognized to be the ultimate power. After his signalling his ship the master, he says, asked him if he could proceed "So I said, 'Yes.'" He looked at the course to see that it complied with the orders from his captain. "The captain approached me and asked my permission to go through the Westray Firth . . . I gave my consent." If the captain had suggested a course that the lieutenant did not approve, the latter said he assumed that he had power to correct it. He recognized that the vessel might possibly be the subject of prize court proceedings. Some comment was made upon the meagreness of the entries in the log as to any control of the master's conduct. But after an entry 'British naval officer boarded ship with prize crew' nothing more was necessary to show what the master understood his position

to be, whether in fact the crew was a prize crew or not. As was said of similar facts in *Muller* v. *Globe & Rutgers Fire Ins. Co.*, 246 Fed. 759, 762, that the vessel and her cargo were seized, arrested and detained within the meaning of the policy we think too plain to require much more than mention. It no more mattered that the master took an active part in the navigation than that the ship still was steered by one of the crew.

As the vessel had passed out of the owner's control before the accident by a seizure within the policy and as the loss happened while the vessel thus was held by an adverse hand, it follows that the libellant must prevail.

Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business. The policies promised that claims would be paid within thirty days after complete proofs of interest and loss had been filed with the Bureau of War Risk Insurance. The proofs seem to have been filed on January 11, 1917. Interest at six per cent should be allowed from February 11, 1917. The decree of the District Court will be corrected so as to allow for total loss of the Llama..... $115,000.00

With interest at six per cent. from February 11, 1917.

Total loss of the freight, &c..... 44,686.82

With interest at six per cent. from February 11, 1917.

Expenses incurred under sue and labor clauses..... 2,270.34

With interest at six per cent. from February 11, 1917.

Thus modified the decree will be affirmed.

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

MR. JUSTICE MCREYNOLDS is of opinion that the decree of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE SUTHERLAND took no part in the decision.

BENJAMIN W. MORSE *v.* THE UNITED STATES OF AMERICA.

HARRY F. MORSE *v.* THE UNITED STATES OF AMERICA.

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

Nos. 597 and 598. Argued January 9, 1925.—Decided February 2, 1925.

1. Appellants were arrested under a federal indictment in New York while traveling through the State to attend trial under another indictment which they had given bail to answer in the District of Columbia, and were thus prevented from being present there at the time set. *Held* that the arrest was not in violation of the due process of law clause of the Fifth Amendment. P. 81.
2. Even if arrest in such circumstances be a breach of comity as between the two federal tribunals, the objection does not concern the constitutional rights of the persons arrested; nor involve a question of jurisdiction or any error reviewable on *habeas corpus*. *Id.*
3. A judgment of a District Court in *habeas corpus* which discharges a defendant held by a commissioner under Rev. Stats. § 1014 for removal to another district and which is based on a finding that the indictment does not charge a criminal offense, is not *res judicata* either as to the validity of the bench warrant issued by the court in which the indictment is pending or as to the sufficiency of the indictment itself. P. 82.

292 Fed. 273, affirmed.

APPEALS from judgments of the District Court dismissing writs of *habeas corpus*.

Mr. Nash Rockwood, with whom *Mr. Charles T. Lark* was on the brief, for appellants.

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

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellants, under indictment in the District of Columbia, while passing through New York on February 6, 1923, on their way to Washington for trial, were arrested and taken from the train by a United States marshal upon bench warrants issued on federal indictments found in New York charging them with fraudulent uses of the mails. Previously, their removal to New York from Connecticut and Massachusetts, respectively, for trial under these indictments had been sought under § 1014 Rev. Stats. The removal of Harry F. Morse from Connecticut had been granted by the commissioner, but, upon *habeas corpus* proceedings, he had been discharged from custody by the Connecticut federal district court for want of probable cause, principally on the ground that the New York indictment was insufficient to charge a criminal offence, 287 Fed. 906; although the New York court had previously held it good. The proceedings for the removal of Benjamin W. Morse from Massachusetts were still pending before the commissioner at the time of the arrest. Both appellants were on bail to answer the District of Columbia indictment. Their case had been peremptorily set for trial on the morning following the arrest, and the effect of it was to prevent their appearance at the time set. Upon these facts, writs of *habeas corpus* were granted by the federal district court for the southern district of New York. After a hearing, the writs were dismissed and these appeals followed.

First. It is contended that the arrest of appellants in New York, while en route to Washington for trial, under the circumstances stated, was arbitrary, unauthorized and

illegal, and constituted a violation of the due process of law clause of the Fifth Amendment. The contention is plainly without merit. The principle that when the jurisdiction of a court has attached, it must be respected as exclusive until exhausted, is a rule of comity, having a wide application in civil cases but a limited one in criminal cases. *Peckham* v. *Henkel,* 216 U. S. 483, 486. The mutual forbearance which two federal courts having coordinate jurisdiction should exercise to prevent conflicts by avoiding interferences with the process of each other, has "perhaps no higher sanction than the utility which comes from concord." *Covell* v. *Heyman,* 111 U. S. 176, 182. But this aside, if there be a violation of the rule of comity here, it primarily concerns only the courts or the sovereignty which is their common superior, and cannot avail the appellants indicted for crimes in the different jurisdictions. Moreover, their constitutional rights are not affected; and if there was error in any respect, it is not reviewable on *habeas corpus. Peckham* v. *Henkel, supra,* p. 487; *Beavers* v. *Haubert,* 198 U. S. 77, 85. And see *In re Fox,* 51 Fed. 427, 430; *United States* v. *Marrin,* 170 Fed. 476, 479–480.

Second. It is urged that the decision of the federal district court in Connecticut discharging Harry F. Morse was *res judicata* and conclusively determined (1) that the New York bench warrant was illegally issued and therefore could not be made the basis for the subsequent arrest in New York; and (2) that the indictment was fatally defective. In respect of the first contention, it is enough to say that the warrant upon which the Connecticut arrest was made was that issued by the commissioner and not the New York bench warrant upon which the present arrest was made. The discharge of the prisoner determined that he could not be held upon the process issued by the commissioner. It had nothing to do with the question whether he could be arrested and held in New York

upon the process issued by the trial court. See *Ex parte Milburn,* 9 Pet. 704, 710; *Barbee* v. *Weatherspoon,* 88 N. C. 19, 20–22; *In re Begerow,* 136 Cal. 293, 299.

The second contention proceeds upon a complete misconception of the purpose for which the indictment is produced and considered in removal proceedings, and the authoritative effect of the ruling of the commissioner and the court on *habeas corpus* in respect thereof. The inquiry in such proceedings is whether there is probable cause to believe the prisoner guilty and justify his removal for trial. That inquiry may be made and the prisoner removed to the trial district in advance of indictment or without the production of the indictment if one has been found. *Greene* v. *Henkel,* 183 U. S. 249, 260; *Pierce* v. *Creecy,* 210 U. S. 387, 403; *United States* v. *Greene,* 100 Fed. 941, 943. The indictment was before the commissioner simply as evidence for the purpose of establishing or tending to establish the commission of an offense; and the commissioner had authority to pass upon its effect in that aspect only. The court reviewing the action of the commissioner under § 1014 upon *habeas corpus* was governed by the same rules and its decision was subject to the same limitation. *Henry* v. *Henkel,* 235 U. S. 219, 230; *Benson* v. *Palmer,* 31 App. D. C. 561, 564–565. Neither had authority to determine the sufficiency of the indictment as a pleading. "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled." *Pierce* v. *Creecy, supra,* pp. 401, 402. In *Benson* v. *Henkel,* 198 U. S. 1, 12, this court said:

"While we have no desire to minimize what we have already said with regard to the indictment setting out the substance of the offense in language sufficient to apprise

the accused of the nature of the charge against him, still it must be borne in mind that the indictment is merely offered as proof of the charge originally contained in the complaint, and not as a complaint in itself or foundation of the charge, which may be supported by oral testimony as well as by the indictment. When the accused is arraigned in the trial court he may take advantage of every insufficiency in the indictment, since it is there the very foundation of the charge, but to hold it to be the duty of the Commissioner to determine the validity of every indictment as a pleading, when offered only as evidence, is to put in his hands a dangerous power, which might be subject to serious abuse. If, for instance, he were moved by personal considerations, popular clamor or insufficient knowledge of the law to discharge the accused by reason of the insufficiency of the indictment, it might turn out that the indictment was perfectly valid and that the accused should have been held. But the evil once done is, or may be, irremediable, and the Commissioner, in setting himself up as a court of last resort to determine the validity of the indictment, is liable to do a gross injustice."

See also *Benson* v. *Palmer, supra; United States* v. *Reddin,* 193 Fed. 798, 802; *In re Hacker,* 73 Fed. 464; *In re Dana,* 68 Fed. 886, 890; *Ex parte Mitchell,* 1 La. Ann. 413, 414. *Benson* v. *Palmer, supra,* contains a very full review of the precise question here under consideration. In the course of the opinion, the court, after pointing out that the discharge of the accused from the process under which he was held in the removal proceedings had nothing to do with the process upon which he was subsequently arrested and held by the trial court, that the indictment could be considered in such proceedings only as evidence, and that a finding thereon "concludes the proceedings for removal, but not for trial," said (p. 568): "It is not the policy of our criminal jurisprudence that an accused shall be permitted to escape trial on the merits of the

charge against him, through a mere defect in the preliminary proceedings leading up to the trial. No discharge by writ of *habeas corpus* will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for writ involves a full investigation into the merits of the case,—the guilt or innocence of the accused." It is unnecessary to refer to other authorities. While they are not entirely harmonious the rule to be deduced therefrom is that the judgment in a *habeas corpus* proceeding can be regarded as conclusive upon the merits only where the case presented is one which calls for a final determination of the ultimate facts and of the law; and not where the proceeding is preliminary and ancillary to a trial upon the merits. See, for example, *United States* v. *Chung Shee,* 71 Fed. 277, 280; *Kurtz* v. *State,* 22 Fla. 36, 45. Thus it is held that a judgment in a preliminary examination discharging an accused person for want of probable cause is not conclusive upon the question of his guilt or innocence and constitutes no bar to a subsequent trial in the court to which the indictment is returned. *Commonwealth* v. *Hamilton,* 129 Mass. 479, 481. Likewise, in extradition proceedings, a discharge for insufficient evidence will not preclude a second inquiry. *In re Kelly,* 26 Fed. 852. And see *Collins* v. *Loisel,* 262 U. S. 426, 429; *In re Begerow, supra,* p. 298. The functions of the commissioner and the court in removal proceedings under § 1014 are of like character and exercised with like effect. The judgment rendered therein, whatever may be its effect in subsequent proceedings of the same character involving the same question—*Salinger* v. *Loisel,* 265 U. S. 224, 230–232; *Collins* v. *Loisel, supra,* p. 430; *United States* v. *Haas,* 167 Fed. 211, 212—does not abridge the power of the trial court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment. In other words, the commissioner, or the court in review on *habeas corpus,* for

lack of power cannot conclusively adjudge the indictment, *qua* indictment, to be either good or bad or pass finally upon the guilt or innocence of the accused. A decision discharging the prisoner neither annuls the indictment nor blots out the offence. Upon the case here presented, the trial court alone had plenary jurisdiction over the cause and consequently alone had plenary power to pass upon the sufficiency of the indictment as the pleading which initiated and was the foundation of the prosecution.

Judgment affirmed.
Mandate to issue forthwith.

JAMES SHEWAN & SONS, INC. *v.* UNITED STATES.

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

No. 42. Argued October 7, 8, 1924.—Decided March 2, 1925.

A libelant whose libel against the United States for repairs on a vessel was dismissed by the District Court but sustained by this Court on appeal, *held* entitled, under the Suits in Admiralty Act, to costs in the District Court and this Court, and interest as that court shall order in accordance with the statute. P. 87.

APPEAL from a decree of the District Court in Admiralty which dismissed a libel for repairs. The decree was reversed (See 266 U. S. 108,) and the present decision is upon an application to withdraw the mandate and to award costs.

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

On November 17, 1924, this Court reversed the decree of the District Court for the Southern District of New York, dismissing a libel in admiralty against the United States, brought to recover the value of repairs made on the steamship Biran, owned by the United States. The suit

was brought under an act authorizing suits against the United States in admiralty, etc., approved March 9, 1920, ch. 95, 41 Stat. 525. Nothing was said in the opinion about costs. The ordinary rule is that costs are not allowed against the United States. *Pine River Company* v. *United States,* 186 U. S. 279, 296; *Stanley* v. *Schwalby,* 162 U. S. 255, 272; *United States* v. *Ringgold,* 8 Peters, 150, 163; *The Antelope,* 12 Wheaton, 546, 550. The mandate issued by the Clerk accordingly did not award any costs against the United States. The appellant now applies for a withdrawal of the mandate, in order to award them. He relies on Section 3 of the act under which the suit was brought. That provides that such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States may include costs of suit, and when the decree is for money judgment, interest also at the rate of 4 per cent. per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest is to run as ordered by the court. In accordance with this provision we must assess the costs of this appeal against the United States and direct the District Court to assess also the costs of suit in that court and interest as that court shall order it in accordance with the statute.

It is so ordered.

EX PARTE IN THE MATTER OF PHILIP GROSSMAN, PETITIONER.

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

No. 24, Original. Argued December 1, 1924.—Decided March 2, 1925.

1. A criminal contempt, committed by disobedience of an injunction issued by the District Court to abate a nuisance in pursuance of

the Prohibition Law, is an "offence against the United States," within the meaning of Article II, § 2, Cl. 1 of the Constitution and pardonable by the President thereunder. P. 108.

2. Before our Revolution, the King of England had always exercised the power to pardon criminal contempts, the pardon being efficacious in so far as punishment was imposed in the public interest, to vindicate the authority of the King and Court (criminal contempt), but not in so far as imposed to secure the rights of a suitor, (civil contempt). P. 110.
3. The like distinction between criminal and civil contempts is clearly made in our law. P. 111.
4. The history of the pardon clause in the Constitutional Convention, *cited* to show that the words "offences against the United States" therein were intended, presumably, to distinguish between offences against the General Government and offences against the States, and not to narrow the scope of a pardon as known in the common law. P. 112.
5. There is no substantial difference in this matter between the executive power of pardon in our Government and the King's prerogative. P. 113.
6. Nor does the ruling of this Court in *United States* v. *Hudson* 7 Cranch, 32, limiting the exercise of ordinary federal criminal jurisdiction to crimes defined by Congress, afford reason for confining "offences against the United States," in the pardon clause, to statutory crimes and misdemeanors. P. 114.
7. Construction of "offences against the United States" in the pardon clause as including criminal contempts, accords with the ordinary meaning of the words and is not inconsistent with other parts of the Constitution where the term "offence" and the narrower terms "crimes" and "criminal prosecutions," appear. Art. I, § 8; Amendments V and VI. P. 115.
8. The power of the President to pardon criminal contempts is sustained by long practice and acquiescence. P. 118.
9. The contention that to admit the power of the President to pardon criminal contempts (not to interfere with coercive measures of the courts to enforce the rights of suitors) would tend to destroy the independence of the Judiciary and would violate the principle of separation of the three departments of the Government, is considered and rejected. P. 119.

Rule in *habeas corpus* made absolute and prisoner discharged.

Habeas corpus, original in this Court, to try the constitutionality of petitioner's confinement notwithstanding a

pardon granted by the President. The petitioner was found guilty by the District Court of having disobeyed a temporary injunction, issued under the Prohibition Act, forbidding illicit traffic in liquors on certain premises. He was sentenced by the District Court to pay a fine and to imprisonment for one year in the Chicago House of Correction—a judgment which was affirmed by the Circuit Court of Appeals. 280 Fed. 683. The President issued a pardon commuting the sentence to the fine, upon condition that the fine were paid; which was done. Having been thereupon released from custody, the petitioner was again committed by the District Court, upon the ground that the pardon was ineffectual, 1 Fed. (2d) 941. He then sought this writ of *habeas corpus,* directed to Graham, the Superintendent of the House of Correction.

Mr. Louis J. Behan, with whom *Mr. Robert A. Milroy* and *Mr. William J. Corrigan* were on the brief, for petitioner.

I. The petitioner was convicted of criminal contempt. *Pino* v. *United States,* 278 Fed. 479; *McGovern* v. *United States,* 280 Fed. 73; *Grossman* v. *United States,* 1 Fed. (2d) 941.

II. A criminal contempt is an offense against the United States because:

(a) The courts have held it to be "a specific criminal offense." *In re Kearney,* 7 Wheat. 38; *New Orleans* v. *N. Y. Mail S. S. Co.,* 20 Wall. 387; *In re Swan,* 150 U. S. 637; *Fanshawe* v. *Tracy,* 4 Biss. 490; *Fischer* v. *Hayes,* 6 Fed. 63; *In re Ellerbee,* 13 Fed. 530; *United States* v. *Berry,* 24 Fed. 780; *Kirk* v. *Milwaukee Dust Collector Mfg. Co.,* 26 Fed. 501; *Bullock Electric & Mfg. Co.* v. *Westinghouse,* 129 Fed. 105; *United States* v. *Jacobi,* 26 Fed. Cases, 564; *In re Litchfield,* 13 Fed. 863; *In re Acker,* 66 Fed. 290; *Passmore Williamson's Case,* 26 Pa. St. 9; *State ex rel.* v. *Sauvinet,* 24 La. Ann. 119; *Sharp* v. *State,*

102 Tenn. 9; *In re Shull,* 221 Mo. 623; *Schwartz* v. *Superior Court,* 111 Cal. 106; *Lester* v. *People,* 150 Ill. 408.

(b) In a criminal contempt, the defendant is presumed to be innocent until guilt is proved beyond a reasonable doubt. *United States* v. *Jose,* 63 Fed. 951; *Michaelson* v. *United States,* 266 U. S. 42; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Jones* v. *United States,* 209 Fed. 585; *Oates* v. *United States,* 233 Fed. 201; *Kelly* v. *United States,* 250 Fed. 947; *Galen* v. *United States,* 250 Fed. 947; *In re Cashman,* 168 Fed. 1008; *United States* v. *Carroll,* 147 Fed. 947.

(c) Prosecutions for criminal contempt are barred by the statute of limitations. *Gompers* v. *United States,* 233 U. S. 604.

(d) In criminal contempt cases the provisions of the Federal Penal Code with respect to removal, arrest and bail are applicable. *Castner* v. *Pocahontas,* 117 Fed. 184; *United States* v. *Jacobi,* 26 Fed. Cases 564, 566.

(e) Review of criminal contempt is the same as in other criminal cases. *In re Merchants Stock & Grain Co.,* 223 U. S. 640; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *In re Christensen Engineering Co.,* 194 U. S. 458.

III. The authority of the President to grant pardon for criminal contempt is sustained:

(a) By custom and usage prior to and at the time of the adoption of the Federal Constitution. *United States* v. *Wilson,* 7 Pet. 150; *Ex parte Wells,* 18 Howard 307; 4 Blackstone Comm. 398; 3 Coke's Institutes, Chap. 105; 5 Comyns Digest, 171, 173, 4th Ed.; 2 Hawkins Pleas of Crown, Secs. 26, 33, Chap. 37, 8th Ed; *Bartram* v. *Dennett,* 23 Engl. Repts. 132, 139; *Barber's Case,* 1 Strange 444; *Bockenham's Case,* 1 Levinz 106; *King* v. *Rodman,* 4 Croke 198; *In re Bahama Islands,* A. C. 138 (1893); *Ex parte Fernandez,* 10 C. B. (N. S.) 25; 142 Engl. Repts, 358; *Seward* v. *Patterson,* 1 Chan. 545; Madison's De-

bates of Federal Convention; Farrand's Records of Federal Convention, Vol. I and Vol. II; Madison's Journal of Federal Convention; The Federalist, Letter LXXIV (Hamilton).

(b) By custom and use since the adoption of the Constitution. 3 Op. A. G., 622; 4 Op. A. G., 458; 19 Op. A. G., 476.

(c) By the broad terms in which the pardon power is granted, and by the specific exception of impeachment cases. See *United States* v. *Wilson,* 7 Peters 150; *Ex parte Wells,* 18 How. 307; *Ex parte Garland,* 4 Wall. 333; *United States* v. *Klein,* 13 Wall. 128; *United States* v. *Thomasson,* 28 Fed. Cas. 82; 13 Corpus Juris 97; 29 Cyc. 1563; 6 Ruling Case Law, 540; 20 Ruling Case Law 537; 1 McClain Crim. L. (1897 Ed.) Sec. 9; 1 Bishop Crim. Law (7th Ed.) Sec. 913; 1 Kent's Comm. (14th Ed.) 343; Story on Const., Vol. 3, Sec. 1488; Rawle on Const. (2d Ed.) 174; 7 Bacon's Abridg., 405, (1845 Ed.); 2 Curtis Hist. Const., 413; 2 Willoughby Const. 1270; Oswald on Contempt (1911 Ed.) 3; 1 Jour. Crim. Law and Criminology 549; 43 Amer. Law Rev. 192; 49 Amer. Law Rev. 648; Ency. Britt., 11th Ed. "Contempt"; *United States* v. *Arrendondo,* 6 Pet. 691; *Bend* v. *Hoyt,* 13 Pet. 263; *Arthur* v. *Cummings,* 91 U. S. 362; *Diehl* v. *Rogers,* 169 Pa. St. 316.

(d) By adjudicated cases on power to pardon contempt. *Ex parte Fiske,* 113 U. S. 713; *Bessett* v. *Conkey,* 194 U. S. 325; *In re Mullee,* Fed. Cas. No. 9911; *In re Mason,* 43 Fed. 510; *Castner* v. *Pocahontas Collieries Co.* 117 Fed. 184; *Butte & C. Co.* v. *Montana Ore Co.,* 158 Fed. 131; *Ex parte Hickey,* 12 Miss. 751; *State, ex rel.* v. *Sauvinet,* 24 La. Ann. 119; *In re Browne,* 2 Colo. 553; *Sharp* v. *State,* 102 Tenn. 9.

The purpose of the contempt proceedings in the case at bar was to assist in the administration of a public law, criminal in its nature; the injunction was directed against acts that were crimes and punishable as such, and the

violation of the injunction was punished, not primarily to vindicate the authority of the court, nor to protect its process of adjudication, but to stop the repetition of such conduct as the legislative policy of the United States had declared to be criminal. The reasons of policy that support executive pardons for crimes are as applicable to the punishment of offenders by contempt proceedings as to the punishment of offenders by ordinary criminal proceedings, whenever the purpose of the former is solely or primarily to secure the enforcement of the criminal law.

It is no more a reflection upon the courts to recognize the pardoning power in the President in a case of a criminal contempt, than to recognize such power where the criminal laws of the people enacted by the legislature have been violated and the defendant is sentenced to imprisonment by the court. The right to punish for contempt of court, cannot be superior to the rights of the people, for all power in the last analysis is granted by and comes from the people.

The reasons may be as potent for the granting of a pardon when crime is punished by equity in contempt proceedings as when it is punished by a common law judge after a conviction by a jury. That the executive should have the power to pardon both classes of offenders seems logical, consistent and socially desirable, nor does it seem any greater blow to the prestige of the court, that the executive should pardon a defendant's commitment for contempt than that he should remit his sentence for crime—both being imposed for the same criminal act, and perhaps imposed by the same judge sitting first in an equity and then in a criminal term of the court.

Mr. Amos C. Miller and *Mr. F. Bruce Johnstone,* Special Assistants to the Attorney General, for respondent.

The natural and ordinarily understood meaning of the words "offences against the United States" does not include contempts of court.

The terms "offence" and "crime" are synonymous and the term "offence against the United States" means the same as "offence against the laws of the United States." Since there are no common law crimes, those terms mean offences denounced as such by the statutes of the United States.

For definitions and instances of the use of the words "crime" and "offence" by courts and text writers see *United States* v. *Wilson,* 7 Peters, 150; *Moore* v. *People,* 14 How. 13; *United States* v. *Hudson,* 7 Cranch 32; *United States* v. *Eaton,* 144 U. S. 677; *In re Chapman,* 166 U. S. 661; *The Laura,* 114 U. S. 411; *Thomas* v. *United States,* 156 Fed. 897; *In re Terry,* 37 Fed. 649; *United States* v. *Boston,* 273 Fed. 535, *Commonwealth* v. *Brown,* 107 Atl. (Pa.) 676; *Dunson* v. *Baker,* 80 So. (La.) 238; *State* v. *West,* 42 Minn. 147; *Cruthers* v. *State,* 161 Ind. 139; *Dominick* v. *Bowdoin,* 44 Ga. 357; *Kopp* v. *French,* 102 N. Y. 583; *Yates* v. *Lansing,* 9 Johns. (N. Y.) 395; 10 Op. A. G. 452; *People* v. *Seymour,* 191 Ill. App. 381; Black's L. Dict. 2d Ed. 487; Stroud's Judicial Dict. 2d Ed. 1318.

These cases disclose a common understanding, extending from (or near) the time of the adoption of the Federal Constitution, that, except in those jurisdictions where there are common law crimes, the word "offence" includes those acts only which have been denounced as such and made punishable by statute.

That contempts of court are "*sui generis*" and the proceedings to punish them are "neither civil actions nor prosecutions for offences within the ordinary meaning of those terms" is the doctrine of this Court. *Bessette* v. *Conkey Co.* 194 U. S. 324; *Eilenbecker* v. *District Court* 134 U. S. 31; *Dunham* v. *United States,* 289 Fed. 376; *Grain Company* v. *Board of Trade,* 201 Fed. 20; *Michaelson* v. *United States,* 266 U. S. 42.

While contempts of court have in some instances been spoken of by this Court as crimes, it is clear that such

classification was for some purpose of procedure only. *New Orleans* v. *Steamship Company,* 20 Wall. 387.

If, as stated by Mr. Justice Holmes in the second *Gompers Case,* contempts of court in England were crimes or offences indictable and punishable as such by the usual criminal procedure, it is because the law of England, unlike our federal law, recognized common law crimes, punishable as such. A contempt of court was not only an offence against the court, it was equally an offence against the King, like every other offence. See dissenting opinion in *Ex parte Wells,* 18 How. 307; *State* v. *Magee Publishing Co.,* 29 New Mexico 455.

As said in *Bessette* v. *Conkey,* 194 U. S. 324, a contempt proceeding is criminal in its nature, in that the party is charged with doing something forbidden, and if found guilty, is punished.

The ordinary classification of contempt as either civil or criminal, can throw no light upon the question here involved. This classification was first adopted, we believe, in the year 1831, in England. *Wellesley* v. *Duke of Beaufort,* 2 Russ. & M. 639, 39 Eng. Rep. 538. It is an artificial one made by the court for the purposes of procedure. It is held by this Court that the violation of a mandatory order of court, punishable by imprisonment or other penalty intended to be coercive, is a civil contempt; whereas, the violation of a prohibitive order of court, punishable by a fine or imprisonment intended as a vindication of the court's dignity, is a criminal contempt. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418. But it is obvious that the flouting of the court's decree is as much a public offence in the one case as in the other, and as destructive of the court's dignity, power and efficiency (if allowed to go unpunished) and of the rights of parties litigant. Indeed, it has been said in substance by this Court, and it is obviously true, that all violations of court orders are both civil and criminal contempts, because all

proceedings for punishment (whichever aspect dominates) are both civil and criminal, in the sense in which the terms are used in the classification; that is to say, all such proceedings, however classified, tend to enforce the property rights of the parties litigant, and also tend to vindicate the dignity of the court, and protect the public respect which is essential to its existence. *Gompers* v. *Bucks Stove & Range Co., supra; Bessette* v. *Conkey Co.* 194 U. S. 324. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *People* v. *Peters,* 305 Ill. 223.

The Constitution and its Amendments in different provisions treat of "offences against the United States," of "offences," of "crimes" and of "criminal prosecutions." Those terms were doubtless used interchangeably. They have always been regarded as substantially synonymous. No reason can be assigned for the use of the one rather than another in any Article of the Constitution. It is impossible to argue that these different terms were used with different ideas in view. These terms are used in six different Articles of the Constitution. It is impressive, we submit, that no one of the six has ever been held to embrace contempts of court.

First. In Article II, § 2, cl. 1, appear the words here in controversy.

Second. Article III, § 2, cl. 3, provides that "The trial of all Crimes except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *."

Since the foundation of our government, at least, it has been universally held that trials of contempts of court need not be, (and until the enactment of the Clayton Act that they could not be) by jury. It is true that in the second *Gompers Case* 233 U. S. 604 the opinion said that contempts of court, even though crimes, need not, under the Constitution, be tried by jury, because they were not so triable when the Constitution was framed. This, how-

ever, we respectfully submit, would be giving the Constitution a somewhat strained construction, making it read: "The trial of all crimes, except in cases of impeachment, and except in cases now otherwise triable, shall be by jury." And since this Court has held that those almost identical words of the Sixth Amendment do not require a trial for contempt to be held in the district of its commission for the reason that a proceeding for contempt is not a criminal prosecution, we can see no ground for not applying the same reasoning to clause 3 of § 2 of Art. III and thus reaching the same conclusion (that jury trials are not required) without doing violence to the language. That this is the correct reason for the conclusion would seem to follow necessarily from a consideration of the second sentence of clause 3. That a contempt trial need not be held in the State where the contempt was committed would seem to be settled. *Myers* v. *United States* 264 U. S. 95. The sole reason is that a contempt trial is not a trial for a crime. *In re Terry,* 37 Fed. 649.

Third. Article IV, § 2, cl. 2, of the Constitution reads: "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled be delivered up to be removed to the State having Jurisdiction of the crime." A careful search has disclosed no case holding that contempt of court is or is not extraditable. We venture the suggestion that by common understanding it is not.

Fourth. The second provision of the Fifth Amendment reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself * * *."

That punishment as for contempt of court of an act which is also a crime is no bar to a criminal prosecution, is well settled law. See *In re Debs,* 158 U. S. 564; *In re*

Chapman, 166 U. S. 661. *Grain Company* v. *Board of Trade,* 201 Fed. 20.

Fifth. The Sixth Amendment directs that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," etc.

It will be noted that the first sentence of this amendment uses the terms "criminal prosecutions" and "crime." It is impossible to argue that one of those terms was intended to be either broader or narrower than the other. It was held by this Court in *Myers* v. *United States, supra,* that "since the foundation of our government, proceedings to punish such offences (contempts of court) have been regarded as *sui generis* and not "criminal prosecutions within the Sixth Amendment, or common understanding." See *Binkley* v. *United States,* 282 Fed. 244; *McCourtney* v. *United States,* 291 Fed. 497; *Ex Parte Terry,* 128 U. S. 289; *Middlebrook* v. *The State,* 43 Conn. 257.

Sixth. The Thirteenth Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Flannagan* v. *Jepson,* (Iowa) 158 N. W. 641 held that imprisonment alone is not servitude; that hard labor is infamous punishment, and as such cannot be imposed for contempt under the Thirteenth Amendment. See *In re Filki,* 80 Cal. 201.

From a study of the records of the Constitutional Convention, and of the various ratifying conventions, it seems clear that neither the framers of the Constitution nor those who subsequently put it into operation ever thought of contempt of court in connection with the power of pardon granted to the President.

Though the clause was liberally debated in the Constitutional Convention, contempts of court were never referred to.

A search of the records of the ratifying conventions, and of the various addresses to the Virginia Convention, fails to disclose that contempts of court were ever touched upon.

The contemporary publications concerning the Constitution between the time of its adoption by the convention and its subsequent ratification, so far as we have been able to ascertain, do not disclose that the subject was ever mentioned.

Furthermore, the record of the Constitutional Convention relating to this pardon provision is confirmatory of the views here expressed.

The pardoning power of the executive cannot be construed to cover contempts of court without encroaching upon the judicial power of the United States, which by the Constitution is vested in the federal courts.

The power to punish for contempt and thereby compel respect for its decrees is an inherent power of the federal courts. It is an essential part of judicial power. *Michaelson* v. *United States,* 266 U. S. 42; *Anderson* v. *Dunn,* 6 Wheat. 204; *Ex parte Terry,* 128 U. S. 289; *Eilenbecker* v. *Dist. Court,* 134 U. S. 31; *Cartwright's Case,* 114 Mass. 230; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Cooper's Case,* 32 Vt. 253; *In re Debs,* 158 U. S. 564; *Watson* v. *Williams,* 36 Miss. 331; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Myers* v. *United States,* 264 U. S. 95.

The Judiciary—concededly the weakest of the three coordinate departments of government—must not be obliged to depend on the Executive for the enforcement of its decrees. Such dependence would violate the principle of separation of powers upon which our governmental structure is based.

The pardon of a crime furnishes no analogy. Having sentenced a criminal for violation of a penal statute, the court's work is completed. It is not directly concerned with the execution of the sentence. In the enforcement of its decrees, however, the court has a continuing interest. A violation of such decrees is a blow at judicial authority. The pardon of a criminal is an act of mercy. The pardon of contempt is a negation of judicial power.

The situation in England is not analogous. There, government is unitarian in form with the King as its nominal head. In theory at least, and by tradition, it is the King's justice which is dispensed. Here, government is trinitarian, and each of the three departments, legislative, executive and judicial, is supreme in its sphere. Contempt of an English court is contempt of the English King. Contempt of a federal court is not contempt of the President.

Our Judicial Department which checks both President and Congress, holding them within constitutional bounds, is without counterpart in England. The duty imposed is heavy and the responsibility great. The security of the people in the rights guaranteed them by the Constitution and against unconstitutional legislation or unwarranted executive interference is the sole objective. How can it be possible for this Court to discharge the duty thus imposed, if it be conceded that a sentence imposed for disobedience of the orders of this Court, entered, it may be, for the purpose of controlling a tyrannical Executive, may be by such Executive immediately nullified? The doctrine of the separation of powers was early recognized by this Court. *Marbury* v. *Madison* 1 Cranch, 137. See *Kilbourn* v. *Thompson,* 103 U. S. 168; *Evans* v. *Gore,* 253 U. S. 245.

Neither opinions of Attorneys General nor acts of the Executive are determinative (discussing *Ex parte Fisk,* 113 U. S. 713; *The Laura,* 114 U. S. 411; *United States* v. *Wilson,* 7 Pet. 150.)

As with opinions of the law department, there is here no element of contemporaneous construction through pardons granted. The earliest instance disclosed occurred forty years after the Constitution had been adopted.

In the entire list submitted by the Attorney General it is important to note that in only five cases does it affirmatively appear that the pardon issued contrary to the wishes of the court which had imposed the sentence.

Constitutional power in the Executive may not be created merely by acquiescence on the part of the courts. The Judicial Department has not the freedom of action accorded Congress or the President—the rational basis for an estoppel in favor of either and against the Judiciary is therefore lacking. Certainly no estoppel can be claimed to exist before this Court has been called upon to act (discussing *United States* v. *Midwest Oil Co.* 236 U. S. 459).

Contempt of court may not be pardoned without impairing the powers and functions of the court and lessening its respect and authority. *Toledo Newspaper Co.* v. *United States* 247 U. S. 402; *Craig* v. *Hecht,* 263 U. S. 255.

The power of the federal court to compel respect for a decree under the Volstead Act is the same power as has been and should be invoked whenever any decree of that court is defied.

We know of no reason justifying a denial of the pardoning power for contempt of Congress that does not apply with equal or greater force to contempts of court. The power to deal with contempt rests on the right of self-preservation. *Marshall* v. *Gordon,* 243 U. S. 521; *Toledo Newspaper Co.* v. *United States* 247 U. S. 402; Story Const. Vol. 2, (5th Ed.) § 1503.

Congress has power to regulate and restrict, but not to destroy, the power of the courts in contempt cases. It may provide for the amelioration of punishments imposed for contempt. Such congressional control is flexible and useful. This flexibility and usefulness will be destroyed

if the pardoning power of the President is enlarged by construction to include contempts. *Ex parte Robinson,* 19 Wall. 505; *The Laura,* 114 U. S. 411; *United States* v. *Daniels,* 279 Fed. 844.

Mr. Attorney General Stone, as *amicus curiae. Mr. Solicitor General Beck* and *Mr. Robert P. Reeder,* Special Assistant to the Attorney General, were also on the brief.

I. The offense for which the petitioner was committed was a criminal contempt; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Michaelson* v. *United States,* 266 U. S. 42; and the more clearly so because under the National Prohibition Act the fine necessarily accrued to the United States.

II. Criminal contempts are offenses against the United States within the meaning of the Pardon Clause of the Constitution.

This Court has repeatedly treated criminal contempt as an offense criminal in its nature. *Michaelson* v. *United States* 266 U. S. 42; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; *Gompers* v. *United States,* 233 U. S. 604; *New Orleans* v. *Steamship Co.,* 20 Wall. 387; *Ex parte Kearney,* 7 Wheat. 38. See also *Bessette* v. *Conkey Co.,* 194 U. S. 324; *Pino* v. *United States,* 278 Fed. 479; *United States* v. *Berry,* 24 Fed. 780; *In re Litchfield,* 13 Fed. 863; *In re Ellerbe,* 13 Fed. 530; *United States* v. *Jacobi,* Fed. Cas. No. 15460; *Fanshawe* v. *Tracy,* Fed Cas. No. 4643. And it is so treated throughout the United States. See *e. g., Sharp* v. *State,* 102 Tenn. 9; *State* v. *Dent,* 29 Kan. 416; *In re Buckley,* 69 Cal. 1; *Williamson's Case,* 26 Pa. St. 9; 13 Corpus Juris, 7.

See the notable series of essays in the Law Quarterly Review: 24 Law Quar. Rev. 184, 266 (1908); 25 *id.* 238, 354 (1909); 36 *id.* 394 (1920); 37 *id.* 191 (1921); 38 *id.* 185 (1922); 40 *id.* 43 (1924); especially 40 *id.* 54, 57, 60. These are summarized in the Harvard Law Review for June, 1924.

It is true that the court has said that criminal contempts are *sui generis* and proceedings for their punishment are not "criminal prosecutions." *Myers* v. *United States,* 264 U. S. 95; but, nevertheless, they constitute offenses against the United States. *State* v. *Magee Publishing Co.,* 29 N. M. 455, 224 Pac. 1028.

Punishment for contempt of court is not imposed out of any personal consideration for the judge, but only to uphold the authority and dignity of the law. While an injured party may condone a disobedience of judicial orders in a civil suit, a court may not condone a criminal contempt, for it constitutes an offense, not against the judge, but against the Government. *In re Rice,* 181 Fed. 217; *State* v. *Sauvinet,* 24 La. Ann. 119; *Ex parte Hickey,* 12 Miss. 751; *State* v. *Magee Publishing Co., supra; Sharp* v. *State,* 102 Tenn. 9. See also *In re Ellerbe,* 13 Fed. 530; *In re Mason,* 43 Fed. 510; *Fanshawe* v. *Tracy,* Fed. Cas. No. 4643, 8 Fed. Cas. 997; 13 Corpus Juris, 97.

III. The history of the power to pardon for criminal contempts establishes that, by the grant of the pardoning power to the President by the Constitution, it was intended to embrace criminal contempts in the phrase "offences against the United States."

Except as to cases of treason, there was no substantial objection to the grant of pardoning power. In cases of impeachment the restraint upon the power was made greater than in England. In all other respects the power to pardon offenses against the Government was, as in England, unlimited, and the propriety of this broad grant of power was unquestioned.

In England contempts of court were within the pardoning power of the Crown. The case most frequently cited is that of *Rex* v. *Buckenham* (1665, 1666) 1 Siderfin, 211, 1 Keble, 751, 787, 852. The pardoning power of the King was also recognized in numerous other cases involving contempts of court. *Anonymous* (1674) Cases in

Chancery, 238; *Fulwood* v. *Fulwood* (1584–5) Tothill, 46; *King and Codrington* v. *Rodman* (1631) Cro. Car. 198, W. Jones, 228; *Bartram* v. *Dannett* (1676) Finch, 253; *Phipps* v. *Earl of Anglesea* (1721), 1 P. Williams, 696; Bishop's New Criminal Law, Sec. 913. *Thomas of Chartham* v. *Benet of Stamford* (1313–1314) 24 Selden Society, 185, is also apparently in point.

At one time this power of pardoning contempts extended even to civil contempts (*Young* v. *Chamberlaine,* Tothill, 41); and as even such a contempt as nonperformance of an order in bankruptcy was treated as breach of the peace (*Ex parte Whitchurch* (1749) 1 Atk. 37) it could have been pardoned. Before the adoption of our Constitution, however, civil contempts had been distinguished from criminal contempts. *King* v. *Myers* (1786) 1 Term, 265. Blackstone pointed out (IV, 285) that where contempts and the process thereon were properly the civil remedy of individuals for private injury they were not released or affected by the general act of pardon. Glanville had said (book 7, chap. 17, last sentence): "The King, indeed, is accustomed to remit the pains of forfeiture and outlawry, yet can not he, under color of this prerogative, infringe upon the rights of others." The rule as to civil contempts was apparently an exception to an earlier rule under which all contempts were pardonable. See Hawkins, Pleas of the Crown, 6th ed. published in 1787, II, 549, 553; Blackstone Comm., IV, 398, 399.

Where a pardon was granted to one who had been convicted and fined for maintaining a nuisance, he was not discharged from abatement of the nuisance, for that was a grievance to other persons, but he was discharged from the fine, which was simply a punishment of the offender. *Rex & Regina* v. *Wilcox,* 2 Salkeld, 458.

The pardoning power has substantially the same scope as it had in England when the Constitution was adopted. *Ex parte Wells,* 18 How. 307.

The President may pardon all offenses against the United States except in cases of impeachment. *Ex parte Garland,* 4 Wall. 333.

IV. The power of the President to pardon criminal contempts of court has been repeatedly exercised and has never been challenged heretofore. 2 Op. A. G. 329; 3 *Id.* 622; 4 *Id.* 317; 4 *Id.* 458; 19 *Id.* 476. Unreported opinions of Attorney General Knox in the *McKenzie Case* (May 1, 1901) and of Attorney General Daugherty in the *Craig Case* (Dec. 3, 1923).

Records of the Department of Justice prove that in twenty-seven cases of criminal contempt in addition to these cited the President has pardoned; and probably there have been many others.

The circumstances attending the granting of the pardon have not been uniform. In some cases the records do not show that the judge who imposed the sentence was consulted; in some the judge recommended pardon; in some he refused to make such a recommendation; in two of the cases the Attorney General advised that the pardon be denied. So far as shown by the records and files of the Department of Justice, however, there has not been a single case of criminal contempt of a federal court from the establishment of the Government down to the case now in isue in which any judge or any Attorney General has questioned the power of the President to pardon the contempt; that power has been exercised in many instances; and it has been expressly or impliedly recognized by every Attorney General and every judge who has considered the question in a concrete case.

V. The weight of authority in cases directly involving pardons for contempt of court supports the power of the President to grant this pardon.

Federal judges who had sentenced persons to punishment for contempt of court have in repeated instances recommended the pardoning of those offenders by the

President. One of the judges who did so was Associate Justice McKinley of this Court, 3 Op. A. G. 622.

Another judge who took a similar view of the power of the President was District Judge Blatchford. *In re Mullee,* 7 Blatch. 23, 17 Fed. Cas. 968. Unfortunately he went too far in failing to recognize that where a fine is imposed not by way of punishment but for the benefit of a private party to whom it is to be paid, the rule as to the pardoning of offenses against the United States does not apply. See *Hendryz* v. *Fitzpatrick,* 19 Fed. 810.

See *Ex parte Hickey,* 12 Miss. 751; *State ex rel. Van Orden* v. *Sauvinet,* 24 La. Ann. 119; *Sharp* v. *State,* 102 Tenn. 9.

Of course, the President of the United States does not stand in the same relation to the courts of this country as existed between the King of England and his own courts *except* in so far as that relation was created by our Constitution. But the Constitution does contain an express grant of pardoning power to the President, and this court has said that the words of that grant are to be interpreted as they were understood when they were placed in the Constitution, as giving to the President the same power to grant pardons as had been possessed by the King of England.

The proposition (*In re Nevitt,* 117 Fed. 448) that the judicial power of the United States was granted in its entirety, free from executive control or supervision is untrue; it would exclude all pardoning power whatever.

The President would not be drawing to himself all the real judicial power by a free exercise of the right to pardon offenses any more than he would be drawing to himself all the legislative power by freely pardoning violators of the criminal laws. He would not be exercising any affirmative judicial or legislative power in either case, and he could not exercise such power.

The fair question is, rather, whether he may thwart the exercise of judicial power to punish offenders against the

Government by granting pardons. The answer is that the Constitution does establish a system of checks and that the pardoning power does furnish a potential check upon some judicial actions. If the President abuses this power he may be impeached. It is, however, no more inherently unreasonable that the President should have the power to pardon criminal contempts than that he should have the power to pardon treason.

It is true that a trial for criminal contempt is *sui generis;* it is true that it has been held that our Constitution does not give to the person accused of criminal contempt all of the protection that is given to a person accused of a typical crime; but whether the trial is before a jury or not, the punishment is for an *offense,* and that offense is really against the Government. *Gompers* v. *United States,* 233 U. S. 604. Moreover, it could not properly be said in the *Verage Case,* 177 Wisc. 295, nor in the present case, that the prisoner "interfered with the proper function of an independent branch of government." He did not commit "an offense which tends to frustrate the administration of justice and to interfere with the operation of the courts." His offense was simply a disobedience of a valid order of the court just as the ordinary crime is a disobedience of a valid law.

Courts have recognized that a criminal contempt can not be condoned by the court (*In re Rice,* 181 Fed. 217); that sentence can not be suspended indefinitely (*Ex parte United States,* 242 U. S. 27); and that "in the absence of statute providing otherwise, the general principle obtains that a court can not set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term." *United States* v. *Mayer,* 235 U. S. 55, 67. The power to grant pardons has been entrusted to the President and has not been entrusted to the courts.

Mr. Francis M. Curlee and *Mr. Charles M. Hay,* by leave of Court, filed a brief as *amici curiae.*

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

This is an original petition in this Court for a writ of *habeas corpus* by Philip Grossman against Ritchie V. Graham, Superintendent of the Chicago House of Correction, Cook County, Illinois. The respondent has answered the rule to show cause. The facts are not in dispute.

On November 24, 1920, the United States filed a bill in equity against Philip Grossman in the District Court of the United States for the Northern District of Illinois, under Section 22 of the National Prohibition Act (Ch. 85, 41 Stat. 305, 314), averring that Grossman was maintaining a nuisance at his place of business in Chicago by sales of liquor in violation of the Act and asking an injunction to abate the same. Two days later the District Judge granted a temporary order. January 11, 1921, an information was filed against Grossman, charging that, after the restraining order had been served on him, he had sold to several persons liquor to be drunk on his premises. He was arrested, tried, found guilty of contempt and sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of $1,000 to the United States and costs. The decree was affirmed by the Circuit Court of Appeals, 280 Fed. 683. In December, 1923, the President issued a pardon in which he commuted the sentence of Grossman to the fine of $1,000 on condition that the fine be paid. The pardon was accepted, the fine was paid and the defendant was released. In May, 1924, however, the District Court committed Grossman to the Chicago House of Correction to serve the sentence notwithstanding the pardon. 1 Fed. (2d) 941. The only

question raised by the pleadings herein is that of the power of the President to grant the pardon.

Special counsel, employed by the Department of Justice, appear for the respondent to uphold the legality of the detention. The Attorney General of the United States, as *amicus curiae,* maintains the validity and effectiveness of the President's action. The petitioner, by his counsel, urges his discharge from imprisonment.

Article II, Section 2, clause one, of the Constitution, dealing with the powers and duties of the President, closes with these words:

". . . and he shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

The argument for the respondent is that the President's power extends only to offenses against the United States and a contempt of Court is not such an offense, that offenses against the United States are not common law offenses but can only be created by legislative act, that the President's pardoning power is more limited than that of the King of England at common law, which was a broad prerogative and included contempts against his courts chiefly because the judges thereof were his agents and acted in his name; that the context of the Constitution shows that the word " offences " is used in that instrument only to include crimes and misdemeanors triable by jury and not contempts of the dignity and authority of the federal courts, and that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitution in the division of powers between the Legislative, Executive and Judicial branches, and to take from the federal courts their independence and the essential means of protecting their dignity and authority.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to

British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.

In a case presenting the question whether a pardon should be pleaded in bar to be effective, Chief Justice Marshall said of the power of pardon (*United States* v. *Wilson,* 7 Peters, 150, 160):

"As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

In *Ex parte William Wells,* 18 Howard, 307, 311, the question was whether the President under his power to pardon could commute a death sentence to life imprisonment by granting a pardon of the capital punishment on condition that the convict be imprisoned during his natural life. This Court, speaking through Mr. Justice Wayne, after quoting the above language of the Chief Justice, said:

"We still think so, and that the language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning

at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the chief executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment."

The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. *Thomas of Chartham* v. *Benet of Stamford* (1313), 24 Selden Society, 185; *Fulwood* v. *Fulwood* (1585), Toothill, 46; *Rex* v. *Buckenham* (1665), 1 Keble 751, 787, 852; *Anonymous* (1674), Cases in Chancery, 238; *King and Codrington* v. *Rodman* (1630), Cro. Car. 198; *Bartram* v. *Dannett* (1676), Finch, 253; *Phipps* v. *Earl of Angelsea* (1721), 1 Peere Williams, 696.

These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law. *In the Matter of a Special Reference from Bahama Islands,* Appeal Cases [1893], 138; *Wellesley* v. *Duke of Beaufort,* 2 Russell & Mylne, 639, 667, (where it is shown in the effect of a privilege from arrest of members of Parliament analogous in its operation to a pardon); *In re Freston,* 11 Q. B. D. 545, 552; *Queen* v. *Barnardo,* 23 Q. B. D. 305; *O'Shea* v. *O'Shea and Parnell,* 15 P. & D. 59, 62, 63, 65; Lord Chancellor Selborne in the House of Lords, 276 Hansard, 1714, commenting on *Greene's Case,* 6 Appeal Cases, 657.

In our own law the same distinction clearly appears. *Gompers* v. *Bucks Stove & Range Company,* 221 U. S. 418; *Doyle* v. *London Guarantee Company,* 204 U. S. 599, 607; *Bessette* v. *Conkey Co.,* 194 U. S. 324; *Alexander* v. *United States,* 201 U. S. 117; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 109. In the *Gompers Case* this Court points out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.

With this authoritative background of the common law and English history before the American Revolution to show that criminal contempts were within the understood scope of the pardoning power of the Executive, we come now to the history of the clause in the Constitutional Convention of 1787. The proceedings of the Convention from June 19, 1787 to July 23rd, were by resolution referred to a Committee on Detail for report of the Constitution (II Farrand's Records of Constitutional Convention, 128, 129) and contained the following (II Farrand, 146): "The power of pardoning vested in the Executive (which) his pardon shall not, however, be pleadable to an impeachment." On August 6th, Mr. Rutledge of the Committee on Detail (II Farrand, 185) reported the provision as follows: "He shall have power to grant reprieves and pardons; but his pardon shall not be pleadable in bar of impeachment." This is exactly what the King's pardon was at common law with the same limitation. IV Blackstone, 399. On August 25th (II Farrand, 411), the words "except in cases of impeachment" were added after "pardons" and the succeeding words were stricken out. On Saturday, September 8th (II Farrand, 547), a committee of five to revise the style of and arrange the articles was agreed to by the House. As referred to the Committee on Style, the clause read (II Farrand, 575): "He shall have power to grant reprieves and pardons except in cases of impeachment." The Committee on Style reported this clause as it now is: "and he shall have power to grant reprieves and pardons for offences against the United States except in cases of impeachment." There seems to have been no discussion over the substance of the clause save that a motion to except cases of treason was referred to the Committee on Style, September 10th (II Farrand, 564), was not approved by the Committee and after discussion was defeated in the Convention September 15th (II Farrand, 626, 627).

We have given the history of the clause to show that the words "for offences against the United States" were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States. It can not be supposed that the Committee on Revision by adding these words, or the Convention by accepting them, intended *sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution.

Nor is there any substance in the contention that there is any substantial difference in this matter between the executive power of pardon in our Government and the King's prerogative. The courts of Great Britain were called the King's Courts, as indeed they were; but for years before our Constitution they were as independent of the King's interference as they are today. The extent of the King's pardon was clearly circumscribed by law and the British Constitution, as the cases cited above show. The framers of our Constitution had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures, save by excepting cases of impeachment; and even in that regard, as already pointed out, the common law forbade the pleading a pardon in bar to an impeachment. The suggestion that the President's power of pardon should be regarded as necessarily less than that of the King was pressed upon this Court and was agreed to by Mr. Justice McLean, one of the dissenting Judges, in *Ex parte William Wells,* 18 Howard, 307, 321, but it did not prevail with the majority.

It is said that "Offences against the United States," in the pardon clause can include only crimes and misde-

meanors defined and denounced by Congressional Act, because of the decision of this Court in *United States* v. *Hudson,* 7 Cranch, 32. This was a criminal case certified from the District Court upon a demurrer to an indictment for criminal libel at common law. The Court sustained the demurrer, on the ground that indictments in federal courts could only be brought for statutory offenses. The reasoning of the Court was that the inferior courts of the United States must be created by Congress, that their jurisdiction, though limited by the Constitution, was in its nature very indefinite, applicable to a great variety of subjects, varying in every State in the Union, so that the courts could not assume to exercise it without legislative definition. The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense. The Court admitted that "certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—enforce the observance of order, etc., are powers which can not be dispensed with in a court because they are necessary to the exercise of all the others and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers." The decision was by a majority of the Court and among the dissenting members was Mr. Justice Story, who expressed himself with vigor to the contrary in *United States* v. *Coolidge,* 1 Gall. 488; Fed. Case No. 14,857, which was reversed by a majority of the Court in 1 Wheat. 415. The *Hudson* decision was made in 1812. It is not too much to say that, immediately after the ratification of the Constitution, the power and jurisdiction of federal courts to indict and prosecute common law

crimes within the scope of federal judicial power was thought to exist by most of the then members of this Court. The charge of Chief Justice Jay to the Grand Jury in the United States Circuit Court at Richmond in May, 1793, and the ruling by the United States Circuit Court in *Henfield's case,* Fed. Case No. 6,360; Wharton's State Trials, 49, in which Mr. Justice Wilson and Mr. Justice Iredell constituted the court, sustained this view. Mr. Warren, in his valuable history of this Court, Vol. I, p. 433, says that in the early years of the Court, Chief Justice Ellsworth and Justices Cushing, Paterson and Washington had also delivered opinions or charges of the same tenor. Justices Wilson and Paterson were members of the Constitutional Convention, and the former was one of the five on the Committee on Style which introduced the words "offences against the United States" into the pardon clause. We can hardly assume under these circumstances that the words of the pardon clause were then used to include only statutory offenses against the United States and to exclude therefrom common law offenses in the nature of contempts against the dignity and authority of United States courts, merely because this Court more than twenty years later held that federal courts could only indict for statutory crimes though they might punish for common law contempts.

Nothing in the ordinary meaning of the words "offences against the United States" excludes criminal contempts. That which violates the dignity and authority of federal courts such as an intentional effort to defeat their decrees justifying punishment violates a law of the United States (*In re Neagle,* 135 U. S. 1, 59, *et seq.*), and so must be an offense against the United States. Moreover, this Court has held that the general statute of limitation which forbids prosecutions "for any offense unless instituted within three years next after such offense shall have been committed," applies to criminal contempts.

Gompers v. *United States,* 233 U. S. 604. In that case this Court said (p. 610):

"It is urged in the first place that contempts can not be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury &c. to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin,* 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S. p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, sub. *v.* Contempt of Court (604); *Re Clements* v. *Erlanger,* 46 L. J., N. S., pp. 375, 383. *Matter of Macleod,* 6 Jur. 461. *Schreiber* v. *Lateward,* 2 Dick. 592. *Wellesley's Case,* 2 Russ. & M. 639, 667. *In re Pollard,* L. R. 2 P. C. 106, 120. *Ex parte Kearney,* 7 Wheat. 38, 43. *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 328, 331, 332. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 441."

The recent case of *Michaelson* v. *United States* fully bears out the same view. 266 U. S. 42, 66, 67.

It is said, however, that whatever may be the scope of the word "offenses" in the particular statute construed in the *Gompers Case,* its association in the Constitution is such as to show a narrower meaning. The word "offences" is only used twice in the original Constitution, once in the pardon clause, and once in Article I, Section 8, among the powers of Congress "to define and punish Piracies and Felonies committed on the high seas and offences against the Law of Nations." In the amendments, "offence" occurs but once and that in the Fifth Amendment in the clause forbidding double jeopardy. We do not see how these other two uses of the word can be said to limit the meaning of "offences" in the pardon clause.

The argument is that the word "offences" is used in the Constitution interchangeably with *crimes* and *criminal prosecutions.* But as has been pointed out in *Shick* v. *United States,* 195 U. S. 65, the term "offences" is used in the Constitution in a more comprehensive sense than are the terms "crimes" and "criminal prosecutions." In *Myers* v. *United States,* 264 U. S. 95, 104, 105, we have but recently held that "while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our Government proceedings to punish such offenses have been regarded as *sui generis* and not criminal prosecutions within the Sixth Amendment or common understanding." *Bessette* v. *Conkey Co.,* 194 U. S. 324, 326. Contempt proceedings are *sui generis* because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction. This is due, of course, to the fact that for years before the American Constitution, courts had been held to be inherently empowered

to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings. So it is clear to us that the language of the Fifth and Sixth Amendments and of other cited parts of the Constitution are not of significance in determining the scope of pardons of "offences against the United States" in Article II, Section 2, clause 1, of the enumerated powers of the President. We think the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing.

Moreover, criminal contempts of a federal court have been pardoned for eighty-five years. In that time the power has been exercised twenty-seven times. In 1830, Attorney General Berrien, in an opinion on a state of fact which did not involve the pardon of a contempt, expressed merely in passing the view that the pardoning power did not include impeachments *or contempts,* using Rawle's general words from his work on the Constitution. Examination shows that the author's exception of contempts had reference only to contempts of a House of Congress. In 1841, Attorney General Gilpin approved the pardon of a contempt on the ground that the principles of the common law embraced such a case and this Court had held that we should follow them as to pardons. (3 Op. A. G. 622.) Attorney General Nelson in 1844 (4 Op. A. G. 317), Attorney General Mason in 1845 (4 Op. A. G. 458), and Attorney General Miller in 1890 (19 Op. A. G. 476), rendered similar opinions. Similar views were expressed, though the opinions were not reported, by Attorney General Knox in 1901 and by Attorney General Daugherty in 1923. Such long practice under the pardoning power and acquiescence in it strongly

sustains the construction it is based on. *Stuart* v. *Laird,* 1 Cranch, 299, 308; *Cooley* v. *Board of Wardens,* 12 How. 299, 315; *Lithographic Company* v. *Sarony,* 111 U. S. 53, 57; *The Laura,* 114 U. S. 411, 416.

Finally, it is urged that criminal contempts should not be held within the pardoning power because it will tend to destroy the independence of the judiciary and violate the primary constitutional principle of a separation of the legislative, executive and judicial powers. This argument influenced the two district judges below. (1 Fed. (2d) 941.) The Circuit Court of Appeals of the Eighth Circuit sustained it in a discussion, though not necessary to the case, in *In re Nevitt,* 117 Fed. 448. The Supreme Court of Wisconsin by a majority upheld it in *State ex rel. Rodd* v. *Verage,* 177 Wis., 295, in remarks which were also *obiter. Taylor* v. *Goodrich,* 25 Texas Civil App., 109, is the only direct authority, and that deals with a clause a little differently worded. The opposite conclusion was reached in *In re Mullee,* 7 Blatchford, 23; *Ex parte Hickey,* 12 Miss. 751; *Louisiana* v. *Sauvinet,* 24 La. Ann. 119; *Sharp* v. *State,* 102 Tenn. 9; *State* v. *Magee Publishing Company,* 29 New Mexico 455.

The Federal Constitution nowhere expressly declares that the three branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The Judges are given life tenure and a compensation that may not be diminished during their continuance in office, with the evident purpose of securing them and their courts an independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the Constitution and the normal operation of government under it

easily demonstrate. By affirmative action through the veto power, the Executive and one more than one-third of either House may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the Judiciary. The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. *Ex parte Garland,* 4 Wall. 333, 380. Negatively, one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmation of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed.

These are some instances of positive and negative restraints possibly available under the Constitution to each branch of the government in defeat of the action of the other. They show that the independence of each of the others is qualified and is so subject to exception as not to constitute a broadly positive injunction or a necessarily controlling rule of construction. The fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the coöperation of the other two, that government may go on. Indeed, while the Constitution has made the Judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look for a continuity of necessary coöperation, in the possible reluctance of either of the other branches, to the force of public opinion.

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate

guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery? A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common law origin and long years of practice and acquiescence.

If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation, might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.

The power of a court to protect itself and its usefulness by punishing contemnors is of course necessary, but it is one exercised without the restraining influence of a jury and without many of the guaranties which the bill of rights offers to protect the individual against unjust conviction. Is it unreasonable to provide for the possibility that the personal element may sometimes enter into a summary judgment pronounced by a judge who thinks his authority is flouted or denied? May it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity.

It goes without saying that nowhere is there a more earnest will to maintain the independence of federal courts and the preservation of every legitimate safeguard of their effectiveness afforded by the Constitution than in this Court. But the qualified independence which they fortunately enjoy is not likely to be permanently strengthened by ignoring precedent and practice and minimizing the importance of the coördinating checks and balances of the Constitution.

The rule is made absolute and the petitioner is discharged.

NAHMEH *v.* UNITED STATES.

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

No. 157. Argued January 6, 1925.—Decided March 2, 1925.

1. Under the Suits in Admiralty Act, suit against the United States may be brought in the district where the libelant resides, as well

as in that where the vessel is found, even though it would have been a suit *in rem* if involving only private parties. P. 125.

2. The language in this regard (§ 2 of Act) should be accorded its broad and ordinary meaning and not be interpreted in a restricted and distributive sense. *Id.*

Reversed.

APPEAL from a decree of the District Court dismissing a libel for want of jurisdiction, as brought in the wrong district.

Mr. Silas Blake Axtell for appellant.

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

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

William Nahmeh, employed as a fireman on the steamship Quinnipiac, was injured August 3, 1920, in the performance of his duties. One of his legs had to be amputated. To recover for this injury, he filed a libel on March 30, 1922, against the United States as owner of the Quinnipiac, under the Suits in Admiralty Act of March 9, 1920, ch. 95, 41 St. 525, in the United States District Court for the Eastern District of New York where he lived. The steamship Quinnipiac was then in the Southern District of New York. The United States appeared specially and excepted, on the ground that the libel did not show that the steamship was at the date of the filing of the libel within the Eastern District of New York, and there was no jurisdiction. December 20, 1922, the appellant made a motion before the District Court for the Eastern District for an order removing the cause to the Southern District. The District Court denied the motion to transfer the cause, and, under a decision of the Court of Appeals for the Second Circuit, in the *Isonomia,* 285 Fed. 516, that the only district in which such a suit

could be brought was where the vessel was, dismissed it for want of jurisdiction.

The Suits in Admiralty Act was passed to provide a suit *in personam* in lieu of the previous unlimited right of suitors to libel merchant vessels belonging to the United States Government *in rem* in the ports of the United States and in its possessions—a right which had proved objectionable. Section 2 and Section 3 of the Act indicate the District Courts in which suits under the Act were thereafter to be brought. The relevant parts of those sections are as follows:

"Section 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found . . . upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

"Section 3. If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem whenever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit."

We held in the case of *Blamberg Brothers* v. *United States*, 260 U. S. 452, that the Act did not authorize a

suit *in personam* against the United States as a substitute for a libel *in rem,* when a United States vessel was not in a port of the United States or in one of her possessions at the time of filing the libel; that Congress had no power to grant immunity from seizure in respect to such vessels when in foreign ports, and did not intend to do so. There has been a difference of opinion, however, with reference to the meaning of the provision as to jurisdiction in Section 2, relating to vessels within the jurisdiction of the United States. The Circuit Court of Appeals of the Second Circuit in the *Isonomia* case construed Section 2, strictly so far as it provides for jurisdiction, because it depends on the statutory consent of the United States. The court, therefore, came to the conclusion that the language fixing three places of jurisdiction under the Act, should not be held to be cumulative but should be applied distributively, and that the provision by which the suits might be brought in the district where the vessel charged with the liability was found should be held to give the only place for jurisdiction in a suit *in personam* against the United States which was substituted by the Act for a suit against the vessel *in rem.* This same view was held by the District Court in *Galban Lobo & Company* v. *United States,* 285 Fed. 665, and in *Axtell* v. *United States,* 286 Fed. 165. A different view was taken in a District Court of South Carolina in *Middleton & Company* v. *United States,* 273 Fed. 199, and in *Alsberg* v. *United States,* 285 Fed. 573, in the Southern District of New York.

The opinion in the *Isonomia* case was carefully prepared, but we think that the rule as to a strict construction of the language of statutes providing for suits against the United States was there carried too far. In taking away what was then the law, namely the right of claimants to sue merchant vessels of the United States as if they were private vessels, Congress was evidently anxious

to consult the convenience of intending libellants as far as it could, and as the United States was present everywhere in the United States, it named as the proper place for suit either the place of the residence of the parties suing, or of any one of them, or their principal place of business, or where the vessel or cargo charged with liability was found. It further expressly provided that those which would have been under the prior act causes of action *in rem* might be united with those *in personam*. To avoid any difficulty in bringing needed parties into the same suit it directed that the cause might be transferred in the discretion of the court to any other District Court in the United States. These liberal provisions indicate that the language used in the section should have its broad and ordinary meaning and should not be interpreted in a restricted and distributive sense. We think, therefore, that the suit brought in the district where the libellant resided was a suit brought in accordance with Section 2, even though it would have been an action *in rem* between private parties, and that it made no difference where the vessel then was, provided only that it was within the jurisdiction of the United States. The decree of the court below must, therefore, be reversed, and the cause remanded to the District Court for further proceedings.

Reversed.

MERCHANTS MUTUAL AUTOMOBILE LIABILITY INSURANCE COMPANY *v.* SMART.

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

No. 223. Argued January 22, 1925.—Decided March 2, 1925.

A state law (N. Y. Laws 1918, c. 182) required that any policy issued by an insurance corporation, in the future, to indemnify the owner of a motor vehicle against liability to persons injured through negligence in its operation, shall provide that the insolvency or bankruptcy of the insured shall not release the company

from payment of damages for an injury sustained during the life of the policy, and that, in case execution against the insured in an action brought by a person so injured shall be returned unsatisfied because of such insolvency or bankruptcy, the injured person may maintain an action against the company on the policy for the amount of the judgment not exceeding the amount of the policy. *Held:*

(1) That the regulation is reasonable, and within the police power; it cannot be said to deprive the Insurance Company of property without due process of law. P. 129.

(2) That it does not conflict with the Bankruptcy Act by providing for an unlawful preference. P. 130.

198 N. Y. S. 949 affirmed.

ERROR to a judgment of the Supreme Court of New York, Appellate Division, affirming a judgment recovered by Smart against the Insurance Company. The New York Court of Appeals declined to review. The facts are given in the opinion.

Mr. Anthony J. Ernest, with whom *Mr. Frederick J. Stone* was on the brief, for plaintiff in error.

Mr. John P. Bramhall for defendant in error.

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

The Merchants Mutual Automobile Liability Insurance Company, the plaintiff in error, is a New York corporation authorized to insure against recoveries of damages by persons injured by automobiles and other vehicles, for whose operation the insured is responsible. It issued a policy August 16, 1919, to Frank Coron, thus to indemnify him in the operation of his automobile truck to the extent of $5,000, together with interest and costs. The policy contained a provision, inserted pursuant to the requirement of Section 109 of the Insurance Laws of New York. (Laws of 1918, ch. 182.) The section reads as follows:

"On and after the first day of January, nineteen hundred and eighteen, no policy of insurance against loss

or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or, against loss or damage to property caused by horses or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any corporation authorized . . . to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, that then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

Smart was injured by the truck of Coron. He brought suit against Coron for damages and recovered a judgment for $11,000. He issued execution against Coron upon the judgment, which was returned unsatisfied, and supplemental proceedings were undertaken against him without success.

The Supreme Court of the State held that on the record Coron was insolvent, that under the clause of the policy embodying the provision of Section 109 the action lay, and because of a failure to set up any good defense, a summary judgment was entered for $5,000 and interest and costs in favor of Smart against the Company.

The case has been brought here by the Company under Section 237 of the Judicial Code, upon the claim that Section 109 is invalid, first in that it deprives the Insur-

ance Company of its property without due process of law, and, second, because it is in conflict with the bankruptcy laws of the United States. It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions. *Northwestern Life Insurance Company* v. *Riggs,* 203 U. S. 243, 254; *Whitfield* v. *Aetna Life Insurance Company,* 205 U. S. 489; *German Alliance Insurance Company* v. *Kansas,* 233 U. S. 389, 412, *et seq.; La Tourette* v. *McMaster,* 248 U. S. 465, 467; *National Insurance Company* v. *Wanberg,* 260 U. S. 71, 73. Such regulation would seem to be peculiarly applicable to that form of insurance which has come into very wide use of late years, that of indemnifying the owners of vehicles against losses due to the negligence of themselves or their servants in their operation and use. The agencies for the promotion of comfort and speed in the streets are so many and present such possibility of accident and injury to members of the public that the owners have recourse to insurance to relieve them from the risk of heavy recoveries they run in entrusting these more or less dangerous instruments to the care of their agents. Having in mind the sense of immunity of the owner protected by the insurance and the possible danger of a less degree of care due to that immunity, it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he

saves himself should certainly inure to the benefit of the person who thereafter is injured. Section 109 does not go quite so far. It provides that the subrogation shall take place only when the insured proves insolvent or bankrupt, and leaves the injured person to pursue his judgment against the insured if solvent without reliance on the policy.

Another reason for the legislation is suggested in the opinion of the Appellate Division of the Supreme Court of New York (*Roth* v. *National Automobile Mutual Casualty Company,* 202 N. Y. App. Div. 667, 674), to wit, that it was enacted on the recommendation of the State Superintendent of Insurance to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss.

Whatever the especial occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and can not be said to deprive the Insurance Company of property without due process of law. It is to be remembered that the assumption of liability by the Insurance Company under Section 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so.

The second objection is that the policy in this clause makes provision for an unlawful preference under the National Bankruptcy Act, when the owner who is indemnified is a bankrupt at the time of the injury.

Passing by the difficulty that suggests itself that the Insurance Company is not one of the creditors of the insolvent insured and so is hardly in position to question the validity of the law for a defect of this kind (*Heald* v. *District of Columbia,* 259 U. S. 114, 123, and cases cited), we prefer to deal with the objection on its merits. It has

no substance. As we have already suggested, the legislature might have required that policies of this kind should subrogate one injured and recovering judgment against the assured to the right of the latter to sue the company on the policy. It simply would create a secured interest in the recovery on the policy for the benefit of the injured person when ascertained. It would not be an unlawful preference any more than security given for any lawful claim against the assured while solvent would be unlawful in the event of subsequent bankruptcy. The clause we have before us is just the same save in one respect. It secures to the injured person the indemnity which his injurer has provided for himself in advance to avoid payment for the injury. But the clause becomes operative only in the event of the insolvency or bankruptcy of the assured when he can no longer use the indemnity to pay the injured person as he should. The title to the indemnity passes out of the bankrupt or insolvent person and vests in him in whom the contract and the state law declares it should vest. The assured is divested by the terms of the instrument under which the interest of the assured and the interest of the injured, then contingent, and now absolute, were created. The general creditors have lost nothing because by the fact of bankruptcy the interest of the assured in the policy passed to the injured person and did not become assets of the assured. The provision for the divesting of the interest on bankruptcy was not made to defraud creditors or in expectation of bankruptcy, but was made so far as we can know when the assured was solvent and merely to provide against a future contingency.

We think that there is in this state legislation complained of, no conflict with the policy or the letter of the bankrupt law.

A third objection is made that there was no sufficient evidence that the insured was insolvent. This was a

question of fact under the proceedings which were instituted by execution and what followed. The state courts have found it to exist and it is not for us to question their findings.

The judgment is

Affirmed.

CARROLL ET AL. *v.* UNITED STATES.

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

No. 15. Argued December 4, 1923; restored to docket for reargument January 28, 1924; reargued March 14, 1924.—Decided March 2, 1925.

1. The legislative history of § 6 of the act supplemental to the National Prohibition Act, November 23, 1921, c. 134, 42 Stat. 223, which makes it a misdemeanor for any officer of the United States to search a private dwelling without a search warrant or to search any other building or property without a search warrant, maliciously and without reasonable cause, shows clearly the intent of Congress to make a distinction as to the necessity for a search warrant in the searching of private dwellings and in the searching of automobiles or other road vehicles, in the enforcement of the Prohibition Act. P. 144.
2. The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. P. 147.
3. Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act, do not violate the Amendment, if made upon probable cause, i. e., upon a belief, reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband liquor. P. 149.
4. Various acts of Congress are *cited* to show that, practically since the beginning of the Government, the Fourth Amendment has been construed as recognizing a necessary difference between a search for contraband in a store, dwelling-house, or other struc-

ture for the search of which a warrant may readily be obtained, and a search of a ship, wagon, automobile, or other vehicle which may be quickly moved out of the locality or jurisdiction in which the warrant must be sought. P. 150.

5. Section 26, Title II, of the National Prohibition Act, provides that when an officer "shall *discover* any person in the act" of transporting intoxicating liquor in any automobile, or other vehicle, in violation of law, it shall be his duty to seize the liquor and thereupon to take possession of the vehicle and arrest the person in charge of it, and that, upon conviction of such person, the court shall order the liquor destroyed, and, except for good cause shown, shall order a public sale, etc. of the other property seized. *Held:*

(*a*) That the primary purpose is the seizure and destruction of the contraband liquor, and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. P. 153.

(*b*) Hence the right to search an automobile for illicit liquor and to seize the liquor, if found, and thereupon to seize the vehicle also and to arrest the offender, does not depend upon the right to arrest the offender in the first instance, and therefore it is not determined by the degree of his offence,—whether a misdemeanor under § 29, Title II of the Act, because of being his first or second offence, or a felony because it is his third; and the rule allowing arrest without warrant for misdemeanor only when the offence is committed in the officer's presence, but for a felony when the officer has reasonable cause to believe that the person arrested has committed a felony, is not the test of the validity of such search and seizure. Pp. 155, 156.

(*c*) The seizure is legal if the officer, in stopping and searching the vehicle, has reasonable or probable cause for believing that contraband liquor is being illegally transported in it. P. 155.

(*d*) The language of § 26,—when an officer shall "discover" any person in the act of transporting, etc.,—does not limit him to what he learns of the contents of a passing automobile by the use of his senses at the time. P. 158.

(*e*) The section thus construed is consistent with the Fourth Amendment. P. 159.

6. Probable cause *held* to exist where prohibition officers, while patrolling a highway much used in illegal transportation of liquor, stopped and searched an automobile upon the faith of information previously obtained by them that the car and its occupants, identified by the officers, were engaged in the illegal business of "bootlegging." P. 159.

7. When contraband liquor, seized from an automobile and used in the conviction of those in charge of the transportation, was shown at the trial to have been taken in a search justified by probable cause, *Held* that the court's refusal to return the liquor on defendants' motion before trial, even if erroneous because probable cause was not then proven, was not a substantial reason for reversing the conviction. P. 162.
8. The Court notices judicially that Grand Rapids is about 152 miles from Detroit, and that Detroit, and its neighborhood along the Detroit River, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. P. 160.

Affirmed.

This is a writ of error to the District Court under Section 238 of the Judicial Code. The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit: 68 quarts of so-called bonded whiskey and gin, in violation of the National Prohibition Act. The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whiskey and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kruska and the two de-

fendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford, working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whiskey. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile Roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro, going eastward from Grand Rapids in the same Oldsmobile Roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the Carroll boys had passed them going toward Detroit and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty, with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned

their car and followed the defendants to a point some sixteen miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskeys, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whiskey and gin. When the defendants were arrested, Carroll said to Cronenwett, "Take the liquor and give us one more chance and I will make it right with you," and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor; and hence the search, seizure and arrest.

Mr. Thomas E. Atkinson and *Mr. Clare J. Hall,* for plaintiffs in error, submitted. *Mr. James N. Lombard* was also on the brief.[1]

There was nothing about the appearance of the car to indicate that it carried liquor. The liquor was only found after a thorough search and destruction of the cushion. Two of the officers testified that they had seen the car twice before, but there was no evidence that it had ever transported liquor before. The officers had never purchased liquor from plaintiffs in error although they testi-

[1]At the former hearing the case was argued by *Mr. Thomas E. Atkinson. Messrs. Clare J. Hall* and *James A. Lombard* were also on the brief.

fied that they had tried and had not been successful. They admit that they had no information that this car was coming through at this particular time and that they were merely patrolling the road.

When an arrest is made without a warrant, the burden is on the officers to show legality of the arrest. At common law a distinction was made between arrest without warrant in the case of felony and in the case of misdemeanor. While an officer might arrest one upon reasonable grounds of suspicion that he had committed a felony, he could not arrest for a misdemeanor unless the offence was committed in his presence. The true rule is that unless the offence is discoverable without a search, it is not, in legal contemplation, committed in the presence of the officer. From their own admission the officers had no reason to believe that the plaintiffs in error were committing a felony or a misdemeanor. The search must therefore have been based upon a mere capricious venture. No misdemeanor was committed in the officers' presence and hence they could not legally arrest without a warrant. *Kurtz* v. *Moffitt,* 115 U. S. 487; *John Bad Elk* v. *United States,* 177 U. S. 529; *Drennan* v. *People,* 10 Mich. 169; *Sarah Way's Case,* 41 Mich. 299; *State* v. *Lutz,* 85 W. Va. 330; *State* v. *Wills,* 91 W. Va. 659; *Snyder* v. *United States,* 285 Fed. 1; *Pickett* v. *State,* 99 Ga. 12; *Roberson* v. *State,* 43 Fla. 156, 52 L. R. A. 751.

Not only does a misdemeanor have to be committed in the presence of the officer, but in addition, it must be a breach of the peace. *State* v. *Lutz, supra.*

No federal statute sets forth the circumstances under which an officer may arrest without a warrant. Under § 28 of the National Prohibition Act, taken in conjunction with § 788 of the Rev. Stats., a prohibition agent would have the same authority to arrest without a warrant, as a state officer. This offence was committed in the State of Michigan, consequently we look to the law of that

State. There appears to be no statute in Michigan upon the subject. *Sarah Way's Case, supra.* The offence here was not a felony. Moreover there were no grounds for belief that a felony had been committed. The facts show that neither of the elements necessary for an arrest without a warrant for a misdemeanor exists in the cause.

The search and seizure were in violation of the Constitution. We do not question the well established principle recognized by way of dictum in *Weeks* v. *United States,* 232 U. S. 383, that an officer may search a person legally arrested to discover and seize the fruits or evidences of the crime. But this principle has no application here for two reasons, viz., first, the search preceded the arrest and, second, the arrest, being illegal, gave no more right to search than if there had been no arrest at all. *Pickett* v. *State, supra; Youman* v. *State,* 189 Ky. 152; *State* v. *Wills, supra; People* v. *Margelis,* 217 Mich. 423; *United States* v. *Myers,* 287 Fed. 260.

There are a few examples of visitorial power of officials to search. They are exceptions and are reasonable only because of the peculiar circumstances under which they are permitted. General executive or judicial warrants to search are void at common law, as seen by the *Wilkes Cases,* and are expressly forbidden by the Constitution. General warrants of authority to search granted by the legislature would be even worse, because their nature would necessarily be more sweeping than executive or judicial warrants and hence more capable of abuse on the part of numerous petty officials.

In two instances officers are granted visitorial powers. Customs officers are granted power by Congress to search persons and property for dutiable goods (Rev. Stats. § 3059). This is a device necessary for the collection of customs and may be said to be a right which the Government exercises over individuals in exchange for the privi-

lege of entering the territory of the United States. Moreover, it is not readily capable of abuse, for the searches are ordinarily made only at points of entry and under the supervision of responsible superiors. It is true also that by § 3061 persons and vehicles may be searched by customs officers outside the customs house. This is for the obvious purpose of reaching dutiable goods which have escaped the payment of duty by evasion. No case has determined its constitutionality. It is extremely doubtful if evidence thus obtained by customs officers could be lawfully used in a criminal prosecution. Moreover, customs officers were limited in number. The power was never given to internal revenue officers, who had, however, a right to inspect distillers etc. without a warrant (Rev. Stats. § 3177). Federal prohibition agents were not granted the right of customs officers but of internal revenue officers only (41 Stat. 316). This indicates a clear legislative intent to deny to prohibition agents the right without a warrant to search persons and vehicles traveling on the highway.

Nor have prohibition agents the right to search all vehicles in order to discover violations under the provisions of § 26 of the National Prohibition Law, which says that when any officer "shall discover" a person in the act of transporting liquor, he shall seize the liquor and arrest the person in charge. *State* v. *One Hudson Automobile,* 190 N. Y. Supp. 481. Reaching the same conclusion is an article entitled: "A New Discovery," by George L. Hunt, 9 A. B. A. Journal, 321.

The history of the Fourth Amendment has been admirably set forth in *Boyd* v. *United States,* 116 U. S. 616. The Amendment mentions four things which are protected, viz, persons, houses, papers and effects. The decisions of this Court, however, have largely been confined to cases in which the houses of accused persons have been searched without a warrant and papers of an evi-

dential nature obtained as a result of the search. But the maxim that "a man's home is his castle" does not include the full scope of the Fourth Amendment. It likewise protects the persons, and effects, wherever they may be, against unreasonable searches and seizures. This is illustrated by the recent case of *Gouled* v. *United States,* 255 U. S. 298, in which this Court held that a seizure by stealth in an office, without a search warrant, was in violation of the Fourth Amendment. The Court attached no significance to the fact that papers, as distinguished from other property, were taken. Moreover, in the case of *Amos* v. *United States,* 255 U. S. 313, whisky seized by federal officers in a search of accused's home without a warrant, was held to be within the protection of the Fourth and Fifth Amendments. The state courts have held, in well considered cases, that a search of personal property not contained in a house or building, without a search warrant, violates the section of the state Bill of Rights corresponding to the Fourth Amendment. *People* v. *Margelis,* 217 Mich. 423; *People* v. *Foreman,* 218 Mich. 591; *Blacksburg* v. *Beam,* 104 S. C. 146; *Tillman* v. *State,* 81 Fla. 558; *Pickett* v. *State,* 99 Ga. 12; *Hoyer* v. *State* (Wisc.), 193 N. W. 89; *Butler* v. *State,* 129 Miss. 778; *State* v. *Wills,* 91 W. Va. 659.

Well considered cases indicate that an officer has no right to search a vehicle traveling on the public highway. *Butler* v. *State, supra; Taylor* v. *State,* 129 Miss. 815; *State* v. *Pluth* (Minn.), 195 N. W. 789; *Hoyer* v. *State supra; State* v. *One Hudson Automobile, supra; State* v. *Gibbons,* 118 Wash. 171.

Citation of similar cases might be multiplied. The cases illustrate the principle that a seizure without a search warrant is unreasonable when an arrest would not be justified without a warrant. The proposition that the evidence which is found justifies the arrest or the seizure is a specious argument and has no support except in one

or two ill-considered district court cases. To use a homely phrase, it is an attempt to pull one's self up by his own bootstraps.

The mere fact that general searches of vehicles may help to enforce the Eighteenth Amendment does not make those searches reasonable.

Conceivably it might be permissible for an officer to search a vehicle before an arrest in cases where the arrest of the occupants might be justified without a knowledge of the facts learned through the search. This would be placing the cart before the horse, however, and we urge that this Court disapprove of such a practice. If the officer clearly knows facts sufficient to justify an arrest, he should make the arrest first and the search afterward.

If the principle of finding justifying the search be a valid one, it means simply that an officer may stop and search every vehicle or foot passenger on the highway and if liquor is discovered the search will be legal. Such practice would, in the words of Mr. Justice Bradley in *Boyd* v. *United States,* " suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

Not only this, but according to the argument, searches of homes without search warrants would be legalized in case liquor were found. This is exactly contrary to the *Amos Case* decided by this Court. *United States* v. *Slusser,* 270 Fed. 818.

If the words " shall discover " in § 26 of the Prohibition Law refer to a discovery by lawful means, the statute adds nothing to the common law power of the enforcing officers. If, on the other hand, it be so interpreted as to give the officers the right to search any and all vehicles passing on the highway, it is clearly in violation of the Fourth Amendment. If it be so construed, it is a general warrant a thousand times more sweeping than those issued against

Wilkes and his associates by Halifax. In the warrants issued by Lord Halifax, the parties were sometimes expressly mentioned by name and always designated as the publishers of certain matter. *Entick* v. *Carrington,* 19 How. St. Tr. 1029; *Leach* v. *Money,* 19 How. St. Tr. 1001; *Wilkes* v. *Wood,* 19 How. St. Tr. 1153.

The word " discover " may mean " finding out," " ascertaining " or " detecting." It is submitted that this is its natural meaning, and not to " examine," " explore," or some other mere action which may or may not result in disclosure. If the latter definition is accepted we have an act of Congress which is in effect a legislative general warrant addressed to all officers to search all vehicles.

Where property or evidence has been obtained through unconstitutional search and seizure, failure to return the same and to suppress the evidence learned thereby constitutes reversible error. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298: *Amos* v. *United States,* 255 U. S. 313.

In addition, the doctrine of the *Boyd* and *Weeks Cases* has found support in many well considered recent cases in the state courts under the provisions of the Bills of Rights in the state constitutions. The following cases in the Circuit Courts of Appeals hold that, in prosecutions for violation of the National Prohibition Act, evidence of liquor obtained by unlawful searches and seizures is inadmissible: *Snyder* v. *United States,* 285 Fed. 1; *Murphy* v. *United States,* 285 Fed. 801. The Circuit Court of Appeals for the second circuit has announced the same doctrine with reference to the possession of narcotics in violation of national law. *Ganci* v. *United States,* 287 Fed. 60.

The plaintiffs in error are entitled to a reversal of the conviction and return of the car and liquor seized.

Mr. Solicitor General Beck, with whom *Mr. Geo. Ross Hull,* Special Assistant to the Attorney General, was on the brief, for the United States.[2]

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

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person, or things to be seized."

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the Act, or which has been so used, and provides that no property rights shall exist in such liquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as

[2]At the former hearing the case was argued by *Mr. Assistant Attorney General Crim. Mr. Solicitor General Beck* and *Mr. Harry Susman* were also on the brief.

a residence in an apartment house, hotel, or boarding house."

Section 26, Title II, under which the seizure herein was made, provides in part as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

The section then provides that the court upon conviction of the person so arrested shall order the liquor destroyed, and except for good cause shown shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By Section 6 of an Act supplemental to the National Prohibition Act, c. 134, 42 Stat. 222, 223, it is provided that if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, "shall search any private dwelling," as defined in that Act, "without a warrant directing such search," or "shall without a search warrant maliciously and without reasonable cause search any other building or property," he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental Act through the Senate, Amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:

"Section 6. That any officer, agent or employee of the United States engaged in the enforcement of this Act or

the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the Court."

This Amendment was objected to in the House, and the Judiciary Committee, to whom it was referred, reported to the House of Representatives the following as a substitute.

"Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this Act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor, shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court."

In its report the Committee spoke in part as follows:

"It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the national prohibition act and would otherwise seriously interfere with the Government in the enforcement of many other laws, as its scope is not limited to the prohibition law

but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeably to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is as a rule contained in the various State constitutions, but notwithstanding that fact search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation.

"The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises.

"Not only does this amendment prohibit search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of."

The conference report resulted, so far as the difference between the two Houses was concerned, in providing for the punishment of any officer, agent or employee of the Government who searches a "private dwelling" without a warrant, and for the punishment of any such officer,

etc., who searches any "other building or property" where, and only where, he makes the search without a warrant "maliciously and without probable cause." In other words, it left the way open for searching an automobile, or vehicle of transportation, without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is *Boyd* v. *United States,* 116 U. S. 616. An Act of Congress of June 22, 1874, authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that under the Fourth Amendment the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and that it was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In *Weeks* v. *United States,* 232 U. S. 383, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal

holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested and while under arrest the marshal had gone to the office of the company without a warrant and made a clean sweep of all books, papers and documents found there and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment and the judgment for contempt was reversed.

In *Gouled* v. *United States,* 255 U. S. 298, the obtaining through stealth by a representative of the Government, from the office of one suspected of defrauding the Government, of a paper which had no pecuniary value in itself but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that when the paper was offered in evidence and duly objected to it must be ruled inadmissible because obtained through an unreasonable search and seizure, and also in violation of the Fifth Amendment because working compulsory incrimination.

In *Amos* v. *United States,* 255 U. S. 313, it was held that where concealed liquor was found by government officers without a search warrant in the home of the de-

fendant, in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Boyd* v. *United States,* 116 U. S. 616, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the Court, speaking through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 623):

" The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the

common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth* v. *Dana,* 2 Met. (Mass.) 329. Many other things of this character might be enumerated."

It is noteworthy that the twenty-fourth section of the Act of 1789 to which the Court there refers provides:

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any

particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 48–51, 1 Stat. 145, 170; in Section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315, and in Sections 68–71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus contemporaneously with the adoption of the Fourth Amendment we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. Compare *Hester* v. *United States,* 265 U. S. 57.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial

and forfeiture. This Act was renewed April 27, 1816, 3 Stat. 315, for a year and expired. The Act of February 28, 1865, revived Section 2 of the Act of 1815, above described, c. 67, 13 Stat. 441. The substance of this section was reënacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as Section 3061. Neither Section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. Indeed that section was referred to and treated as operative by this Court in *Cotzhausen* v. *Nazro,* 107 U. S. 215, 219. See also *United States* v. *One Black Horse,* 129 Fed. 167.

Again by Section 2140 of the Revised Statutes any Indian agent, sub-agent or commander of a military post in the Indian Country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian Country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched, and if any liquor is found therein, then it, together with the vehicles, shall be seized and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian Country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian Country, to be seized and forfeited if found; and of the Act of June 30, 1834, Section 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian Country to cause the boats, stores or places of deposit of such person to be searched and the liquor found forfeited. This Court recognized the statute of 1822 as justifying such a search and seizure in *American Fur Co.* v. *United States,* 2 Pet. 358. By the Indian

Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian Territory may be seized, libeled and forfeited as provided in the Revised Statutes, Section 2140.

And again, in Alaska, by Section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors, or any person authorized by them in writing, shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties or forfeiture under the Act and to keep and deliver the same; and the Attorney General, in construing the Act, advised the Government: "If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the 3-mile limit according to the practice of customs officers when acting under Section 3059 of the Revised Statutes, and to seize such vessels." 26 Opinions Attorneys General 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable

if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, Title II, of the National Prohibition Act, like the second section of the Act of 1789, for the searching of vessels, like the provisions of the Act of 1815, and Section 3061, Revised Statutes, for searching vehicles for smuggled goods, and like the Act of 1822, and that of 1834 and Section 2140, R. S., and the Act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian Country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and thirdly, the driver was to be arrested. Under Section 29, Title II, of the Act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine or 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for his first and second offenses and for a felony if he offends the third time. The main purpose of the Act obviously was to deal with the liquor and its transportation and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the for-

bidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under Section 28, Title II, of the Prohibition Act the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided,* That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

It follows from this that if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. *Stacey* v. *Emery,* 97 U. S. 642. The measure of legality of such a seizure is,

therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* and *Amos* cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States* v. *Kaplan,* 286 Fed. 963, 972.

But we are pressed with the argument that if the search of the automobile discloses the presence of liquor and leads under the statute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed

in his presence. *Kurtz* v. *Moffitt,* 115 U. S. 487; *Elk* v. *United States,* 177 U. S. 529. The rule is sometimes expressed as follows:

"In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." Halsbury's Laws of England, Vol. 9, part III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, 1 Stephen, History of Criminal Law, 193, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant. *Rohan* v. *Sawin,* 5 Cush. 281. The argument for defendants is that as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it. *Elrod* v. *Moss,* 278 Fed. 123; *Hughes* v. *State,* 145 Tenn. 544.

So it is that under the rule contended for by defendants the liquor if carried by one who has been already twice convicted of the same offense may be seized on information other than the senses, while if he has been only once convicted it may not be seized unless the presence of the liquor is detected by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental as shown by the light-

ness of the penalty. See *Commonwealth* v. *Street,* 3 Pa. Dist. & Co. Reports, 783. In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of Section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. *Agnew* v. *Haymes,* 141 Fed. 631, 641. The language of the section provides for seizure when the officer of the law "discovers" any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks* v. *United States,* 232 U. S. 383, 392; *Dillon* v. *O'Brien and Davis,* 16 Cox. C. C. 245; *Getchell* v. *Page,* 103 Me. 387; *Kneeland* v. *Connally,* 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer

has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform. *Houck* v. *State,* 106 Ohio St. 195, accords with this conclusion. *Ash* v. *United States,* 299 Fed. 277 and *Milam* v. *United States,* 296 Fed. 629, decisions by the Circuit Court of Appeals for the fourth circuit, take the same view. The *Ash* case is very similar in its facts to the case at bar and both were by the same court which decided *Snyder* v. *United States,* 285 Fed. 1, cited for the defendants. See also *Park* v. *United States* (1st C. C. A.) 294 Fed. 776, 783, and *Lambert* v. *United States,* (9th C. C. A.) 282 Fed. 413.

Finally, was there probable cause? In *The Apollon,* 9 Wheat. 362, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the Court, said (page 374):

"It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geo-

graphical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety, and may be gathered from the public documents of the government."

We know in this way that Grand Rapids is about 152 miles from Detroit and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called " bootleggers " in Grand Rapids, i. e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade. That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear,

the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey* v. *Emery,* 97 U. S. 642, 645, a suit for damages for seizure by a collector, this Court defined probable cause as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." *Locke* v. *United States,* 7 Cranch, 339; *The George,* 1 Mason, 24; *The Thompson,* 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth* v. *Carey,* 12 Cush. 246, 251 that "if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." *Commonwealth* v. *Phelps,* 209 Mass. 396; *Rohan* v. *Sawin,* 5 Cush. 281, 285. In *McCarthy* v. *De Armit,* 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

"The substance of all the definitions is a reasonable ground for belief in guilt."

In the case of the *Director General* v. *Kastenbaum,* 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 28):

"But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent,

which in the judgment of the court would make his faith reasonable." See also *Munn* v. *De Nemours,* 3 Wash. C. C. 37.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the Government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is

Affirmed.

MR. JUSTICE MCKENNA, before his retirement, concurred in this opinion.

The separate opinion of MR. JUSTICE MCREYNOLDS concurred in by MR. JUSTICE SUTHERLAND.

1. The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice." Sir William Scott, *The Louis,* 2 Dodson 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by Federal officers without a warrant and upon mere suspicion—ill founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act (c. 85, 41 Stat. 305). They maintain that both arrest and seizure were unlawful and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: *Crowell* v. *M'Fadon,* 8 Cranch 94, 98; *United States* v. *1960 Bags of Coffee,* 8 Cranch 398, 403, 405; *Otis* v. *Watkins,* 9 Cranch 339; *Gelston* v. *Hoyt,* 3 Wheat. 246, 310, 318; *Wood* v. *United States,* 16 Pet. 342; *Taylor* v. *United States,* 3 How. 197, 205. They turned upon express provisions of applicable Acts of Congress; they did not involve the point now presented and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

Whether the officers are shielded from prosecution or action by Rev. Stat. Sec. 970 is not important. That section does not undertake to deprive the citizen of any constitutional right or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors—nothing more—and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. *United States* v. *Harris,* 177 U. S. 305, 310. And the well settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. *Moffitt,* 115 U. S. 487, 498—" By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence except in the case

of felony, and then only for the purpose of bringing the offender before a civil magistrate."

Elk v. *United States,* 177 U. S. 529, 534—"An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

Commonwealth v. *Wright,* 158 Mass. 149, 158—"It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possesssion of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. . . . The Legislature has often empowered officers to arrest without warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law."

Pinkerton v. *Verberg,* 78 Mich. 573, 584—"Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. . . . If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer."

3. The Volstead Act contains no provision which annuls the accepted common law rule or discloses definite intent

to authorize arrests without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view Section 26 is relied upon—

"When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

Let it be observed that this section has no special application to automobiles; it includes *any* vehicle—buggy, wagon, boat or air craft. Certainly, in a criminal statute, always to be strictly construed, the words "shall discover . . . in the act of transporting in violation of the law" cannot mean, shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following: "An Act to regulate the collection of duties on imports and tonnage," approved March 2, 1789, c. 22, 1 Stat. 627, 677, 678; "An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise im-

ported into the United States, and on the tonnage of ships or vessels," approved August 4, 1790, c. 35, 1 Stat. 145, 170; "An Act further to provide for the collection of duties on imports and tonnage," approved March 3, 1815, c. 94, 3 Stat. 231, 232. These and similar Acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

"An Act supplemental to the National Prohibition Act," approved November 23, 1921, c. 134, 42 Stat. 222, 223, provides—

"That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for warrants in order to search private dwellings and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches and distinguished between them by declaring the former criminal. But the connection between this distinction, and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is

valid, and so are some seizures. But what of it? The Act made nothing legal which theretofore was unlawful, and to conclude that by declaring the unauthorized search of a private dwelling criminal Congress intended to remove ancient restrictions from other searches and from arrests as well, would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures, unreasonableness often depends upon the means adopted. Here the seizure followed an unlawful arrest, and therefore became itself unlawful—as plainly unlawful as the seizure within the home so vigorously denounced in *Weeks* v. *United States,* 232 U. S. 383, 391, 392, 393.

In *Snyder* v. *United States,* 285 Fed. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine: "That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think,

neither justifies the assault nor condemns the principle which makes such an act unlawful."

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In *Weeks* v. *United States, supra,* through Mr. Justice Day, this court said: "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have

resulted in their embodiment in the fundamental law of the land."

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385, 391: "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States,* 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Gouled v. *United States,* 255 U. S. 298, and *Amos* v. *United States,* 255 U. S. 313, distinctly point out that property procured by unlawful action of Federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal and violated the guarantee of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest and was therefore obtained in violation of their constitutional

rights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a Federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwelt, chief prohibition officer. His entire testimony as given at the trial follows—

"I am in charge of the Federal Prohibition Department in this District. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes Street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Kiro and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of Grand Rapids, to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the sixth day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light

lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th day of October it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

"On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said 'there goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them; drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me and called me by the name of 'Fred' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the

name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor and give us one more chance and I will make it right with you.' At the same time he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a ten dollar bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

"As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the Marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits 'A' and 'B.'

"Q. Now, those two bottles, Exhibits 'A' and 'B,' were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it go up here?

"A. We didn't label them out on the road; simply found it was liquor and sent it in; and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles and Mr. Johnson's name is on the label that goes over the box with mine, and this liquor was taken out of the case today. It was taken out for the purpose of analyzation. The others were not broken until today.

"Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it, yes sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.

"[Cross-examination.] I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

"Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir.

"Q. And took possession of it, arrested them, and brought them in? A. Yes, sir.

"Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time.

"[Redirect examination.] The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whiskey in one lazyback."

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came two and a half months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say

so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me it seems clear enough that the judgment should be reversed.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this opinion.

WORK, SECRETARY OF THE INTERIOR *v.* UNITED STATES EX REL. RIVES.

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

No. 272. Argued November 25, 26, 1924.—Decided March 2, 1925.

1. Where the duties imposed upon an executive officer by a statute granting gratuities based on equitable and moral considerations include the duty of construing the statute itself in its execution, his construction of it is a discretionary act which can not be controlled by the writ of mandamus. P. 177.
2. Under § 5 of the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, refusal by the Secretary of the Interior to allow a claim for money spent to obtain a release from a contract to buy manganese land, the refusal being based upon the view that expenditures for real estate or mining rights were not "for or upon" property, but were speculative, within the meaning of the act—was conclusive against the claimant. P. 178.
3. The amendment of November 23, 1921, c. 137, 42 Stat. 322, did not change the act in this regard. P. 182.
4. This case, upon the facts admitted by the demurrer to the answer, is not within the class allowing mandamus to compel an officer to take action and exercise his discretion, or an inferior tribunal to take jurisdiction. P. 184.

54 App. D. C. 84; 295. Fed. 225 reversed.

APPEAL from a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment of the Supreme Court of the District in mandamus, directing the Secretary of the Interior to consider and allow relator's claim, under the Dent Act, in so far as it included money spent to obtain a release from a contract he had made before the Armistice, to buy land containing manganese.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for plaintiff in error.

Mr. Leslie C. Garnett, with whom *Mr. Burgess W. Marshall* was on the brief, for defendant in error.

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

This is an appeal under section 250 of the Judicial Code, par. 6, from a judgment of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, granting a mandamus compelling the Secretary of the Interior to consider and allow a claim for net losses suffered by Logan Rives, the relator, in producing and preparing to produce manganese at the instance of the Government for war purposes, under section 5 of the Dent Act (March 2, 1919, ch. 94, 40 Stat. 1272).

Relator's petition shows that he incurred losses aggregating $55,204.15, but that the Secretary awarded him only $23,047.36, refusing to allow him, among other items, $9,600 which he had to expend in obtaining a release from a contract to buy land containing manganese, after the land had lost most of its value because of the armistice. The mandamus asked is to compel consideration and allowance of the claim for this particular item.

The Secretary's answer avers that the relator received and accepted the $23,047.36 awarded March, 1920, but

refused to waive any right to further award under any subsequent legislation which might provide for further payment. The answer further denies that the Secretary refused to consider the claim, but avers that he did so fully and rejected it. The relator demurred to the answer and on that demurrer judgment followed and the writ issued.

Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. They begin on one side with *Kendall* v. *United States,* 12 Peters, 524, in which Congress directed the Postmaster General to make some credit entries in an account found to be just by the Solicitor of the Treasury. This Court held that the duty was ministerial with no discretion and required the Postmaster General to make the entries. On the other side, is *Decatur* v. *Paulding, Secretary of the Navy,* 14 Peters, 497. Congress there provided for general naval pensions by general Act, and by resolution of the same day granted a special pension for the widow of Commodore Decatur. She received the pension under the general law and then applied for the special pension, which was refused by the

Secretary of the Navy, on the ground that she was given an election of one of two funds and she had elected. She sought by mandamus to compel the Secretary, who under the law administered the Naval Pension fund, to allow the special pension. This Court held that Congress intended the Secretary to construe the statutes and to allow the pensions accordingly, and that although the court might, as a matter of legal construction, differ from his conclusion, it could not by mandamus or injunction constrain him in his exercise of his discretion. Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall Case* and less than in the *Decatur Case,* and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose.

The Dent Act was passed by Congress in an effort to do justice and equity to the many persons who could not obtain from the Government compensation for supplies or services furnished or losses incurred in helping the Government during the war, because of a lack of enforceable contracts or equities. As to supplies and services furnished, there was to be a settlement made by the Secretary of War, and if this did not satisfy the claimant, he was given a right under section 2 to sue in the Court of Claims to recover greater compensation. Section 3 gave the Secretary power to settle fairly and equitably claims of foreign governments and their nationals for supplies and services rendered to the American Expeditionary forces whether by contract entered into in accordance with applicable statutory provisions or not. By section 4, the Secretary was given power to protect sub-contractors in his awards.

By section 5, provision was made, not to pay for supplies or services rendered directly to the Government, but to relieve a class of persons who were invited by the Gov-

ernment to invest money in the production and preparing for the production of certain metals or materials difficult to obtain, and needed for the war, and who had thereupon incurred expense therein and had suffered losses because of the coming of the armistice and the consequent destruction of the market for such metals.

The said Secretary was to make adjustments and payments in each case as he should determine to be just and equitable; and the decision of the Secretary was to be "conclusive and final." There were five provisos: The first imposed a limit of total expenditure under the Act. The second limited claims to those filed within three months after the passage of the Act.

The third proviso declared: "That no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained . . . manganese . . . in sufficient quantities to be of commercial importance." The fourth proviso was: "That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April 6, 1917, and prior to November 12, 1918 in a legitimate attempt to produce . . . manganese . . . for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary." The fifth proviso declared that the settlement of any claim under the section should not bar the Government through any authorized agency or any Congressional committee thereafter duly appointed from the review of such settlement, nor the right to recover any money paid by the Government to any party under the section if the Government had been defrauded.

The last paragraph of the section declared "That nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States" and closed with a proviso that in determining the net losses of any claimant, the Secretary should take into consideration and charge to him the then market value of any ores or minerals on hand belonging to him, and the salvage or usable value of his machinery or other appliances claimed to have been purchased to comply with the request of the Government.

On November 23, 1921, after the first award in this case, section 5 was amended (Ch. 137, 42 Stat. 322) by adding another proviso, that all claimants who in response to the request of any government agency mentioned in the Act expended money "in producing or preparing to produce" manganese, and had mailed their claims in time, "if the proof in support of said claims clearly shows them to be based upon action taken in response to such request . . . shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act. If in claims passed upon under said Act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts."

This amendment was brought about on the recommendation of the Secretary of the Interior, because he had felt obliged, under section 5 as it was, to reject some 600 claims for failure within the time limit to show a direct personal request or demand upon the claimant by the government authorities named in the Act and a response thereto by the claimant and because the Comptroller had refused to pay any changed award of the Secretary made after a rehearing or to correct miscalculation.

It is urged that the refusal of the Secretary to allow the loss of $9,600 on the real estate contract is in the teeth of the third proviso, which requires him to allow for expenditures made or obligations incurred " for and upon property " containing manganese in sufficient quantities to be of commercial importance. The Interior Department had held from the beginning that this proviso did not embrace money spent for real estate or mining rights. The ruling was based in part at least on the legislative history of the bill, which showed that it originally contained an express provision for expenditures for real estate as a proper element in calculating the net losses to be reimbursed, and that this provision was objected to as involving too speculative a subject matter and it was stricken out. The Department's view was that expenditures " for and upon " property containing manganese and other metals did not include cost of real estate or mining rights because too speculative under the limitations of the fourth proviso and were intended to be confined to expenditures for construction, equipment and machinery in development of such property.

We are asked to reject this interpretation as wholly at variance with the natural and necessary meaning of the words and to confirm the courts below in enforcing a view more liberal to the claimant.

The above summary of section 5 clearly shows that Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. It was a gratuity based on equitable and moral considerations. *United States* v. *Realty Company,* 163 U. S. 427, 439; *Allen* v. *Smith,* 173 U. S. 389, 402. Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the Government under the first and second sections of the Act, make the losses recoverable in

a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. It hedged the granting of the equitable gratuity with limitations to prevent the use of the statute for the recovery of doubtful or fraudulent claims or merely speculative losses. It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden. By the fifth proviso, however, the Government was permitted through any of its agencies or even by a committee of Congress duly authorized, to review the settlement by the Secretary and by necessary implication to reverse it. If the Government was defrauded, it was authorized to sue to recover any money paid under the award.

Congress was occupying toward the proposed beneficiaries of section 5 the attitude rather of a benefactor, than of a debtor at law. Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the *Decatur Case*.

Nor does the amendment of 1921 change the effect of the Act in this regard. His counsel insist that it was adopted in order to relieve claimants from previous narrow rulings of the Secretary. There is nothing in the amendment that indicates the Congressional purpose to do more than it purports to do, i. e., to enable the Secretary to entertain claims for losses incurred at the instance of any government agencies whether direct and personal or by public invitation, and to enable the Secretary to grant rehearings, correct miscalculation and award addi-

tional amounts. The amendments still left all claims to his sense of justice and equity.

Two cases upon which the relator relies, do not aid him. They depend on the construction of the particular statute. In *Work* v. *Mosier,* 261 U. S. 352, we held that the statutory direction that certain income due minors of the Osage Indians be paid was clear and positive and it was not left to the Secretary of the Interior to vary it, i. e., he was not given discretion finally to construe it. In *Work* v. *McAlester,* 262 U. S. 200, it was held that by virtue of the statute a lessee had a vested right to buy the land at an original appraisement and that the Secretary had no authority to affect that right by ordering another appraisement.

Ness v. *Fisher,* 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock,* 190 U. S. 316; *Alaska Smokeless Company* v. *Lane,* 250 U. S. 549; and *Hall* v. *Payne,* 254 U. S. 343, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a mandamus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. *United States ex rel. Tucker* v. *Seaman,* 17 How. 225; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register and Receiver,* 9 Wall. 575; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. All rest upon the *Decatur Case.* Compare *United States* v. *Babcock,* 250 U. S. 328, 331. There is

nothing in the award by the Secretary in the case at bar which would justify characterizing it as arbitrary or capricious or fraudulent or an abuse of discretion. The Secretary's view that it was not just or equitable to include loss by a land purchase within the gratuity of the Government as defined by the statute must therefore prevail against mandamus.

Lane v. *Hoglund,* 244 U. S. 174, *Ballinger* v. *Frost,* 216 U. S. 240, *Garfield* v. *Goldsby,* 211 U. S. 249, *Roberts* v. *United States,* 176 U. S. 221, *Butterworth* v. *Hoe,* 112 U. S. 50, *United States* v. *Schurz,* 102 U. S. 378, were all cases in which the court found that all the conditions had been fulfilled upon which the relator in the mandamus was entitled to call upon the officer to do an act beneficial to the relator and that the act was thus a ministerial duty, as in the *Kendall Case.*

There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are *Louisville Cement Company* v. *Interstate Commerce Commission,* 246 U. S. 638, and *Interstate Commerce Commission* v. *Humboldt S. S. Company,* 224 U. S. 474. They follow the decision in *Commissioner of Patents* v. *Whiteley,* 4 Wall. 522. They are analogous to *Hohorst, Petitioner,* 150 U. S. 653; *Parker, Petitioner,* 131 U. S. 221; *Ex parte Parker,* 120 U. S. 737, and others which hold that mandamus may issue to an inferior judicial tribunal if it refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It is sought to bring the present case within this class by the averment in the petition that the Secretary of the Interior has refused to take jurisdiction of the claim for the loss of $9,600 through the real estate contract. This aver-

ment is met by a denial in the answer and the affirmative allegation that the Secretary did consider the claim and disallowed it for cause deemed by him to be good. This mandamus was granted by the courts below on demurrer to the answer. Its allegations must be taken as admitted. Moreover, it is clearly shown by the exhibits to the pleadings that the Secretary decided that on its merits the claim was not for the kind of loss which Congress intended the Secretary to reimburse.

Our conclusion makes it unnecessary for us to consider the contention of the Government that the relator here is estopped to urge the present claim by his acceptance of the award already made.

Reversed.

WORK, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORPORATION.

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

No. 401. Argued November 26, 1924.—Decided March 2, 1925.

1. Where the answer of an officer to a petition for a mandamus shows clearly that the claim sought to be enforced was considered and denied by him, the writ, if granted on demurrer to the answer, can not be sustained as merely requiring that he take jurisdiction to decide the claim. See P. 186.
2. Under § 5 of the Dent Act, a decision of the Secretary of the Interior that interest paid on capital borrowed is not part of the net losses incurred by a claimant for and in the production of mineral, is a discretionary decision not reviewable by mandamus. *Work* v. *Rives, ante,* p. 175. P. 187.

54 App. D. C. 380; 298 Fed. 839, reversed.

APPEAL from a judgment in the Court of Appeals of the District of Columbia which affirmed a judgment of the Supreme Court of the District, in mandamus, re-

quiring the Secretary of the Interior to consider and allow a claim for interest, under the Dent Act.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellant.

Mr. Edgar Watkins, with whom *Mr. Hoke Smith* and *Mr. Mac Asbill* were on the brief, for appellee.

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

This is an appeal under section 250 of the Judicial Code, par. 6, from a writ of mandamus compelling the Secretary of the Interior to consider and allow a claim of the Chestatee Pyrites & Chemical Corporation, under section 5 of the Dent Act. It presents questions very similar to those heard in *Work* v. *United States ex rel. Rives,* just decided, *ante,* p. 175.

The relator owned a pyrites mine before the war. In compliance with the request of the Government to enlarge its plant to meet the war necessities, it borrowed the sum of $695,000, on which it obligated itself to pay interest at the rate of 6 per cent. per annum. After three hearings before the Secretary of the Interior, it was awarded $693,313.79. In making the award the item of interest claimed of more than $40,000 on the amount borrowed was disallowed. The mandamus herein issued to compel the consideration and allowance of this interest.

It is sought in this case, as it was in the *Rives Case,* to avoid the objection that the mandamus would control and restrict the statutory discretion vested in the Secretary by the averment that he had not taken jurisdiction of the claim for interest and had not considered it. This case, like the *Rives Case,* was heard on demurrer to the answer, and the answer shows clearly that the claim for

interest was fully considered by two Secretaries of the Interior and denied.

The only issue is whether the Secretary had discretion under section 5 finally to determine whether interest paid upon the capital borrowed is to be considered as part of the net losses incurred by the relator in preparing for and producing the pyrites. We think he had.

Great reliance was placed by the courts below on the ruling of this Court in *United States* v. *New York,* 160 U. S. 598. That was an appeal from a decision of the Court of Claims in a case brought by the State of New York against the United States under a statute of the United States, by which the Secretary of the Treasury was directed to pay out of any money in the Treasury not otherwise appropriated, to the Governor of any State, the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the insurrection against the United States. It was held that the State could recover interest on the bonds issued by it to do the things provided for in the Act.

The Act did not vest in the Secretary of the Treasury discretion finally to decide the extent of the indebtedness, and the claim was duly transferred to the Court of Claims in order that a judgment might be rendered thereon. The judgment was carried to this Court. The issue, therefore, was merely a question of law whether under the statute interest was payable, and it was held that it was.

The circumstances of the case were different from this, and it is doubtful whether the conclusion as to interest in such case would be applicable to the claim made by the relator, even if we could hear it on its merits. But it is not here on its merits. The question was one for the Secretary of the Interior to decide, and that finally.

Reversed.

SAMUELS *v.* McCURDY, SHERIFF OF DEKALB COUNTY, GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 225. Argued January 22, 1925.—Decided March 2, 1925.

1. A State law (Georgia Ls. 1917, Ex. Sess.) making it unlawful for a person to possess intoxicating liquors which, previously to its enactment, he had lawfully acquired for consumption as a beverage in his home, and subjecting them to seizure and destruction, is not an *ex post facto* law. P. 193.
2. The seizure and destruction, without compensation, of such liquors, pursuant to the State prohibition laws, does not deprive such possessor of property without due process of law. P. 194.
3. When a State law denied property rights in intoxicating liquors, and made their possession unlawful, except for medicinal and other specified uses under special permit, and provided for seizure under search warrant, and for destruction by an order of court to be made without first hearing the person from whom they were taken; *held*, that the denial of such hearing did not render the law invalid under the due process clause of the Fourteenth Amendment, as applied to one who did not claim to be within the statutory exceptions and whose contention that the law violated his constitutional property rights in liquors seized under it was heard in a suit brought by himself to enjoin their destruction and regain possession. P. 199.

157 Ga. 488, affirmed.

ERROR to a judgment of the Supreme Court of Georgia which affirmed a judgment dismissing a suit brought by the plaintiff in error to enjoin the defendant in error, a sheriff, from destroying intoxicating liquors pursuant to an order of court, and for specific recovery of the liquors.

Mr. Hooper Alexander for plaintiff in error.[1]

It may well be doubted whether the prohibition against possession, as contained in the Act of 1917, was ever intended to apply to liquors already in possession.

[1] Defendant in error submitted on the printed record.

Is the law *ex post facto?* When the substance of the act is considered, the objection is well taken. We recognize the soundness of the doctrine announced in *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, and *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67. In the case now considered the statute, if it applies to these previously acquired liquors, would be violated by plaintiff, not by doing a prohibited act or by refusing to do what is commanded, but merely by doing nothing.

It may be said that in *Tranbarger's Case* also, the railroad was merely passive. But this is more apparent than real. The statute of Missouri commanded an affirmative act, viz., the opening of the drains, and penalized the refusal. The act we complain of does not do this. It penalizes mere passivity. The lawful purchase had resulted in a condition, to-wit, a physical possession that was lawful when acquired. The statute punishes that. When the State of Georgia makes it a misdemeanor merely to possess liquor, is this not punishing the citizen for having acquired the possession? See *Duncan* v. *Missouri,* 152 U. S. 382; *Calder* v. *Bull,* 3 Dall. 386; *Cummings* v. *Missouri,* 4 Wall. 277; *Fletcher* v. *Peck,* 6 Cranch 137.

The provision as to possession deprives plaintiff in error of his property without due process of law. *Delaney* v. *Plunkett,* 146 Ga. 547, distinguishing *Barbour* v. *State,* 146 Ga. 667, 249 U. S. 454. See *Bartemeyer's Case,* 18 Wall. 129; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 33; *Barbour* v. *Georgia,* 249 U. S. 454; *Eberle* v. *Michigan,* 232 U. S. 700.

In affirming the judgment of the court below, the Supreme Court of Georgia necessarily ruled that a sheriff may seize and destroy the property of a citizen without any accusation or pleading, without any hearing from him, and without a judgment. There is no law in Georgia conferring such summary power on the sheriff. There could not be. Section 20 of the Act of Nov. 17, 1915,

declares the liquors prohibited in that act to be contraband and provides for their destruction after a hearing and judgment. Unless they can be destroyed as there provided, there is no statutory provision for their destruction.

The hearing must be given, not as a matter of grace but as a matter of right. It is equally axiomatic that the hearing on a prayer for injunction is not a substitute for a hearing in the first instance. An application for injunction is aimed at an unauthorized destruction before a hearing had upon legal process instituted by the sheriff. Had such a process been taken the owner would have been thereby informed as to the grounds on which his property was to be condemned; would be entitled to be heard, and would have found it necessary only to disprove those allegations of wrong on which the seizure was made. It is no substitute for such a proceeding to hear him come in and set up, in the dark, that there was no ground at all, and negative every possible or conceivable ground. Such a thing puts upon him the unreasonable burden of disproving every possibility, even those that did not exist, or which it might never occur to him could be conjectured.

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

Sig Samuels, a resident of DeKalb County, Georgia, filed his petition in the Superior Court of that county against its sheriff, J. A. McCurdy, in which he prayed for the specific recovery of certain intoxicating liquors belonging to him which he averred had been seized on search warrant by the defendant. He asked an injunction to prevent their destruction. A rule to show cause issued and a restraining order. A general demurrer to the petition was sustained and the case dismissed. On error to the Supreme Court of the State, the judgment was affirmed. This is a writ of error to that judgment.

The petition averred that Phillips, a deputy of the defendant, went to Samuels' residence and acting under a search warrant seized and carried away a large quantity of whiskeys, wines, beer, cordials and liquors; that he stored these in the jail of the county; that it was the purpose of the defendant to destroy them, without any hearing of the petitioner; that the value of the liquors, at the scale of prices current before the prohibition laws, was approximately $400, but at the prices paid thereafter, if illegally sold, would be very much more; that the greater part of the liquors was bought by the petitioner and kept at his home prior to the year 1907; that the balance thereof was legally purchased by him in the State of Florida and legally shipped to him in interstate commerce prior to the year 1915; that, although a citizen of the United States and the State of Georgia, the petitioner was born in Europe where the use of such liquors had been common; that he had been accustomed to their use all his life; that he purchased them lawfully for the use of his family and friends at his own home, and not for any unlawful purpose.

The session laws of Georgia for 1907, page 81, now embodied in Section 426 of the Georgia Penal Code, declare that:

"It shall not be lawful for any person within the limits of this State to sell or barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or keep or furnish at any other places, or manufacture, or keep on hand at their place of business any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters, or other drinks which, if drunk to excess, will produce intoxication; and any person so offending shall be guilty of a misdemeanor."

By Act of November 17, 1915, Section 2, it is provided:

"It shall be unlawful for any person . . . to manufacture, sell, offer for sale, . . . keep on hand at a place

of business or at or in any social, fraternal or locker club, or otherwise dispose of any of the prohibited liquors and beverages described in Section 1 of this Act, or any of them, in any quantity; but this inhibition does not include, and nothing in this Act shall affect, the social serving of such liquors and beverages in private residences in ordinary social intercourse."

Section 20 of same Act reads as follows:

"Sec. 20. Be it further enacted by the authority aforesaid, That no property rights of any kind shall exist in said prohibited liquors and beverages, or in the vessels kept or used for the purpose of violating any provision of this Act or any law for the promotion of temperance or for the suppression of the evils of intemperance; nor in any such liquors when received, possessed or stored at any forbidden place or anywhere in a quantity forbidden by law, or when kept, stored or deposited in any place in this State for the purpose of sale or unlawful disposition or unlawful furnishing or distribution; and in all such cases the liquors and beverages, and the vessels and receptacles in which such liquors are contained, and the property herein named, kept or used for the purpose of violating the law as aforesaid, are hereby declared to be contraband and are to be forfeited to the State when seized, and may be ordered and condemned to be destroyed after seizure by order of the court that has acquired jurisdiction over the same, or by order of the judge or court after conviction when such liquors and such property named have been seized for use as evidence."

By Act of March 28, 1917, it is declared that:

"It shall be unlawful for any corporation, firm, person, or individual to receive from any common carrier, corporation, firm, person or individual or to have, control, or possess, in this State, any of said enumerated liquors or beverages whether intended for personal use or otherwise, save as is hereinafter excepted."

The provision of 1915 which permitted the social serving of liquors and beverages in private residences and in ordinary social intercourse was expressly repealed by the Act of 1917. Under other provisions liquor and wine may be held for medicinal, mechanical and sacramental purposes on special permits. There are not claimed to be any circumstances in this case excepting the liquors here seized from the condemnation of the Act of 1917.

Three grounds are urged for reversal. First, the 1917 law under which liquor lawfully acquired can be seized and destroyed is an *ex post facto* law. Second, the law in punishing the owner for possessing liquor he had lawfully acquired before its enactment, deprives him of his property without due process. Third, it violates the due process requirement by the seizure and destruction of the liquor without giving the possessor his day in court.

First. This law is not an *ex post facto* law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law. It is quite the same question as that presented in *Chicago & Alton R. R. Co.* v. *Tranbarger,* 238 U. S. 67. There a Missouri statute required railroads to construct water-outlets across their rights of way. The railroad company had constructed a solid embankment twelve years before the passage of the Act. The railroad was penalized for non-compliance with the statute. This Court said:

"The argument that in respect of its penalty feature the statute is invalid as an *ex post facto* law is sufficiently answered by pointing out that plaintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act in 1907, but because after that time it maintained the embankment in a manner prohibited by that act."

Second. Does the seizure of this liquor and its destruction deprive the plaintiff in error of his property without due process of law, in violation of the Fourteenth Amendment?

In *Crane* v. *Campbell,* 245 U. S. 304, Crane was arrested for having in his possession a bottle of whiskey for his own use, and not for the purpose of giving away or selling the same to any person. This was under a provision of the statute of Idaho that it should be unlawful for any person to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors. It was held that the law was within the police power of the State. The Court said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors, within its borders without violating the guarantees of the Fourteenth Amendment." Citing *Bartemeyer* v. *Iowa,* 18 Wall. 129; *Beer Company* v. *Massachusetts,* 97 U. S. 25, 33; *Mugler* v. *Kansas,* 123 U. S. 623, 662; *Crowley* v. *Christensen,* 137 U. S. 86, 91; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, 330, 331.

The Court pointed out that as the State had the power to prohibit, it might adopt such measures as were reasonably appropriate or needful to render exercise of that power effective; and that considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, the Court was unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose, that the right to hold intoxicating liquor for personal use was not one of those fundamental privi-

leges of a citizen of the United States which no State could abridge, and that a contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. It did not appear in that case when the liquor seized had been acquired, but presumably after the prohibitory act.

In *Barbour* v. *Georgia,* 249 U. S. 454, it was held that the Georgia prohibitory law, approved November 18, 1915, but which did not become effective until May 1, 1916, was not invalid under the Fourteenth Amendment when applied to the possession of liquor by one who had acquired it after the approval of the law and before it became effective.

These cases it is said do not apply, because the liquor here was lawfully acquired by Samuels before the Act of 1917 making it unlawful for one to be possessed of liquor in his residence for use of his family and his guests.

In *Mugler* v. *Kansas,* 123 U. S. 623, it appeared that the breweries, the use of which as such was enjoined as a nuisance, and the beer, the sale of which was also enjoined, were owned by Mugler before the Prohibition Act, making both unlawful. In answering the argument that, even if the State might prohibit the use and sale, compensation should be made for them before putting it into effect, to accord with the Fourteenth Amendment, Mr. Justice Harlan, speaking for the Court, said:

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not

disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

"It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi,* above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the

special exigencies of the moment may require'; and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself.' "

In view of this language and the agreed statement of facts, the decision necessarily was that the sale of beer made and owned before the prohibition law could be punished by that law as a nuisance and that no compensation was necessary, if the legislature deemed this to be necessary for the health and morals of the community.

It is true that a remark in the opinion in *Eberle* v. *Michigan,* 232 U. S. 700, 706, refers to the question as still an open one, and the same reference is made in *Barbour* v. *Georgia,* 249 U. S. 454, 459. In *Hamilton* v. *Kentucky Distilleries Company,* 251 U. S. 146, 157, there is a similar reference, though with a suggestive citation to *Mugler* v. *Kansas.* And in *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, after calling attention to this reservation, this Court said:

"It should, however, be noted that, among the judgments affirmed in the *Mugler Case,* was one for violation of the act by selling beer acquired before its enactment (see pp. 625, 627); and that it was assumed without discussion that the same rule applied to the brewery and its product (see p. 669)."

But it was not found necessary to consider the question in the *Jacob Ruppert Case,* because there was no appropriation of property but merely a lessening of value due to permissible restriction imposed upon its use.

The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by any one because of the demoralizing effect of drunkenness upon society. The state has the power to subject those members of society who might indulge in the use of such liquor without injury to themselves to a deprivation of access to liquor in order to remove temptation from those whom

its use would demoralize and to avoid the abuses which follow in its train. Accordingly laws have been enacted by the States, and sustained by this Court, by which it has been made illegal to manufacture liquor for one's own use or for another's, to transport it or to sell it or to give it away to others. The legislature has this power whether it affects liquor lawfully acquired before the prohibition or not. Without compensation it may thus seek to reduce the drinking of liquor. It is obvious that if men are permitted to maintain liquor in their possession, though only for their own consumption, there is danger of its becoming accessible to others. Legislation making possession unlawful is therefore within the police power of the States as a reasonable mode of reducing the evils of drunkenness, as we have seen in the *Crane* and *Barbour* cases. The only question which arises is whether for the shrunken opportunity of the possessor of liquor who acquired it before the law, to use it only for his own consumption, the State must make compensation. By valid laws, his property rights have been so far reduced that it would be difficult to measure their value. That which had the qualities of property has, by successive provisions of law in the interest of all, been losing its qualities as property. For many years, every one who has made or stored liquor has known that it was a kind of property which because of its possible vicious uses might be denied by the State the character and attributes as such; that legislation calculated to suppress its use in the interest of public health and morality was lawful and possible, and this without compensation. Why should compensation be made now for the mere remnant of the original right if nothing was paid for the loss of the right to sell the liquor, give it away or transport it? The necessity for its destruction is claimed under the same police power to be for the public betterment as that which authorized its previous restrictions. It seems to us that this conclusion finds support

in the passage quoted above from the opinion in the *Mugler Case* and its application to the agreed facts, and in *Gardner* v. *Michigan,* 199 U. S. 325, and *Reduction Company* v. *Sanitary Works,* 199 U. S. 306. See also *American Storage Company* v. *Chicago,* 211 U. S. 306, and *Adams* v. *Milwaukee,* 228 U. S. 572, 584; *Lawton* v. *Steele,* 152 U. S. 133, 136; *United States* v. *Pacific Railroad,* 120 U. S. 227, 239. In *Gardner* v. *Michigan* a municipal ordinance was held valid which required the owner to deliver to the agent of the city all garbage with vegetable and animal refuse, although it was shown that it was property of value because it could be advantageously used for the manufacture of commercial fat. It was decided that the police power justified the legislature or its subordinate, the city council, in the interest of the public in removing and destroying the garbage, as a health measure, without compensation.

Finally, it is said that the petitioner here has no day in court provided by the law, and therefore that in this respect the liquors have been taken from him without due process. The Supreme Court of Georgia has held in *Delaney* v. *Plunkett,* 146 Ga. 547, 565, that, under the 20th Section of the Act of November 17, 1915 (Georgia Laws, Extra. Session 1915, p. 77,) quoted above, which declares that no property rights of any kind shall exist in prohibited liquors and beverages, no hearing need be given the possessor of unlawfully held liquors, but that they may be destroyed by order of the court. In the *Plunkett Case* the seizure was of liquor held in excess of an amount permitted by the law of 1915. By the amendment of 1917, as already pointed out, possession even for home use is now forbidden. As in the *Plunkett Case,* the petitioner does not deny that the liquor seized was within the condemnation of the law and that he has no defense to his possession of it except as he asserts a property right protected by the Fourteenth Amendment which we have

found he does not have. As a search warrant issued, the seizure was presumably valid. The law provides for an order of destruction by a Court, but it does not provide for notice to the previous possessor of the liquor and a hearing before the order is made. Under the circumstances, *prima facie,* the liquor existed contrary to law and it was for the possessor to prove the very narrow exceptions under which he could retain it as lawful. If he desired to try the validity of the seizure, or the existence of the exception by which his possession could be made to appear legal, he could resort to suit to obtain possession and to enjoin the destruction under the Georgia law, as he has done in this case. This under the circumstances, it seems to us, constitutes sufficient process of law under the Federal Constitution as respects one in his situation. *Lawton* v. *Steele,* 152 U. S. 133, 142. What might be necessary, if he were claiming to hold the liquor lawfully for medicinal or some other specially excepted purpose, we need not consider.

The averment in the petition was that the sheriff intended to destroy the liquor. There is no averment in the petition that he did not intend to do this by order of Court upon his application. We must take it for granted on the demurrer, therefore, as against the pleader that the sheriff did not intend to depart from Section 20 of the Act of 1915, and that the question made here is on the validity of that section.

Judgment affirmed.

MR. JUSTICE BUTLER, dissenting.

I cannot agree with the opinion of the Court in this case. Plaintiff in error is a man of temperate habits, long accustomed to use alcoholic liquor as a beverage. He never sold or in any way illegally dealt with intoxicating liquors and has never been accused of so doing. His supply was lawfully acquired years before the passage of the

enactment in question (the Act of March 8, 1917) for the use of himself, his family and friends in his own home, and not for any unlawful purpose. It consisted of spirituous, vinous and malt liquors and, before the passage of the act, was worth about $400. September 21, 1922, a deputy sheriff or constable, in company with a number of other persons, went to the house of plaintiff in error and searched it and seized and carried away his stock of liquor and delivered it to the sheriff. It was his purpose summarily to destroy it. This suit was brought to restrain him.

Plaintiff in error insists that the seizure deprived him of his property in violation of the due process clause of the Fourteenth Amendment. The decisions of this court in *Crane* v. *Campbell,* 245 U. S. 304, and *Barbour* v. *Georgia,* 249 U. S. 454, are not controlling. In the *Crane Case,* the Idaho statute under consideration (c. 11, Session Laws 1915) made it unlawful to have in possession or to transport any intoxicating liquor within a prohibition district in that State. Crane was accused of having in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same. The state Supreme Court said: "The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above-mentioned is prohibited." 27 Idaho 671, 679. The point was not made that the liquor was lawfully acquired or that it had never been unlawfully sold, transported or held. Presumably, the whiskey was acquired after the act took effect, and it could not be claimed that it had not been sold or transported in violation of law. In the *Barbour Case,* the prosecution was

under Georgia legislation approved November 18, 1915, which did not take effect until May 1, 1916. Barbour was convicted of having more than a gallon of vinous liquor in his possession on June 10, 1916. This Court, following the Supreme Court of Georgia, assumed that the liquor was acquired after the act was passed and before it took effect, and held that Barbour took the liquor with notice that after a day certain its possession, by mere lapse of time, would become a crime. The act of 1907, now section 426 of the Georgia Penal Code, was in force and made it unlawful for any person to sell or barter intoxicating liquors. It did not appear and was not claimed that the liquor had been lawfully acquired by the accused or that it had not been sold, transported or held in violation of law. The precise question here raised was not decided in either of these cases. Each presented facts materially different from those in the present case.

The seizure and destruction cannot be sustained on the ground that the act in question destroyed the value of the liquor. The question of compensation is not involved. That alcoholic liquors are capable of valuable uses is recognized by the whole mass of state and national regulatory and prohibitory laws, as well as by the state legislation in question. The liquors seized were valuable for such private use as was intended by plaintiff in error. The insistence is that the State is without power to seize and destroy a private supply of intoxicating liquor lawfully acquired before the prohibitory legislation and kept in one's house for his own use. Such seizure and destruction can be supported only on the ground that the private possession and use would injure the public. See *Mugler* v. *Kansas,* 123 U. S. 623, 663; *Gardner* v. *Michigan,* 199 U. S. 325, 333.

The enactment does not directly forbid the drinking of intoxicating liquors. The State Supreme Court has not construed it to prevent such private use of intoxicants.

It is aimed at the liquor traffic. See *De Laney* v. *Plunkett,* 146 Ga. 547; *Barbour* v. *State,* 146 Ga. 667; *Bunger* v. *State,* 146 Ga. 672, cited by that court as authority for its decision in this case. Attention has not been called to any legislation which attempts directly to forbid the mere drinking or other private use of such liquors. As against the objection that it would infringe constitutional provisions safeguarding liberty and property, the power of the State to enact and enforce such legislation has not been established. That question is not involved in this case.

Any suggestion that the destruction of such private supply lawfully acquired and held for the use of the owner in his own home is necessary for or has any relation to the suppression of sales or to the regulation of the liquor traffic or to the protection of the public from injury would be fanciful and without foundation. The facts in the case do not permit the application of the doctrine applied in *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204.

To me it seems very plain that, as applied, the law is oppressive and arbitrary, and that the seizure deprived plaintiff in error of his property in violation of the due process clause of the Fourteenth Amendment. I would reverse the judgment of the state court.

PENNSYLVANIA RAILROAD SYSTEM AND ALLIED LINES FEDERATION NO. 90, ET AL. *v.* PENNSYLVANIA RAILROAD COMPANY, ET AL.

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

No. 661. Argued January 13, 1925.—Decided March 2, 1925.

1. Since, as decided in *Pennsylvania Railroad Co.* v. *Labor Board,* 261 U. S. 72, the provisions of Title III of the Transportation Act, 1920, seeking to promote adjustment of disputes between carriers and their employees through conferences and through decisions of

the Railroad Labor Board, rely only upon the moral sanction of public opinion and do not grant rights enforceable in a court of law, a carrier, in dealing with its employees concerning wages and working conditions, is not bound by rulings of the Board affirming the right of any craft or class to select a trade union as their representative, but may substitute an election whereby only individuals, chosen regionally, are elected and votes for a union are rejected; may refuse to allow furloughed employees to vote in the election, and may even threaten discharge of employees who do not consent to the agreement made with the representatives elected. P. 210.

2. These things, being within the legal rights of a railroad company, are not subject to be enjoined, at the suit of a union composed of existing and former employees, upon the ground that the company and its officers, in doing them, are guilty of a conspiracy both at common law and under § 19 of the Criminal Code. *Id.*

3. Denial of the prayer for equitable relief and dismissal of the main part of the bill carries with it incidental claims for damages, without prejudice to their prosecution at law by individual claimants. P. 218.

1 Fed. (2d) 171, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (296 Fed. 220) dismissing the bill in a suit brought by a union, composed of present and former workers of the Pennsylvania Railroad Company, to enjoin the corporation and its officers from carrying out an alleged conspiracy to defeat the provisions of the Railroad Labor Board legislation and to deprive the employees of rights under it. Damages also were prayed. The case is fully stated in the opinion.

Mr. Morris Hillquit and *Mr. David Wallerstein* for appellants.

Mr. John Hampton Barnes for appellees.

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

The Pennsylvania Railroad System and Allied Lines Federation No. 90, by its bill in equity herein against the

Pennsylvania Company and its officers, continued the controversy which was considered in *Pennsylvania Railroad Company* v. *Labor Board,* 261 U. S. 72. The Company filed an answer, and the case was heard in the District Court for the Eastern District of Pennsylvania on exhibits and evidence. The District Court dismissed the bill, 296 Fed. 220, and the decree was affirmed in the Third Circuit Court of Appeals, 1 Fed. (2d) 171. The issues involve the construction and application of Title III of the Transportation Act of 1920, Ch. 91, 41 Stat. 456, 469. The Title provides a method for the settlement of disputes over wages, rules and working conditions between railroad companies engaged in interstate commerce and their employees, and, as a means of securing it, creates the Railroad Labor Board and defines its functions and powers.

The Pennsylvania Railroad System and Allied Lines Federation No. 90 is a trades union of 50,000 employees or more affiliated with the American Federation of Labor, and embracing those crafts which have to do with the mechanical part of railroad service. It contains as members only workers, or those who have been workers, in the employ of the Pennsylvania Company or its Allied Lines. Our statement of the case and the opinion in what we shall call the Labor Board case show the dealings between the Company and Federation No. 90 down to and beyond the time when the Transportation Act was passed and the railroad property was turned back by the Government to the Company. The Railroad Labor Board, April 14, 1921, decided that the *modus vivendi* under which rules and working conditions under the Railroad Administration had continued should end July 1, 1921, and called upon each carrier and its respective employees to designate representatives to confer and decide, so far as possible, respecting their future rules and working conditions and to keep the Board advised of the progress toward agreement. The Board accompanied their announcement,

known as Decision 119, with a statement of rules of decision which it intended to follow in consideration of the settlement of disputes under Title III. The two which are relevant here, as they were in the case cited, are as follows:

"5. The right of such lawful organization [i. e. trade unions] to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management."

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

Officials of Federation No. 90 met the representatives of the Pennsylvania Railroad Company, in compliance with the request of the Board, in May, 1921. The Pennsylvania representatives refused to confer, on the ground that the Federation did not represent a majority of the employees of the system, and proposed to send out a form of ballot to their employees asking them to designate their representatives. The Federation officers objected, because the ballot made no provision, in accordance with principles 5 and 15, for the representation of employees by a trade union, but specified that they must be natural persons and such only as were employees of the Pennsylvania Company; and further because the Company required that the representatives of the employees should be selected regionally rather than from the craft in the whole system, in compliance with Principle No. 15. The result was that two ballots were sent out, one by the Company and the other by the Federation. These forms were both

found objectionable by the Board, which by its decision No. 218 ordered a new election for which rules were prescribed and a form of ballot specified on which labor organizations, as well as individuals, could be voted for as his representatives at the option of the employee. The Pennsylvania Company applied to the Board to vacate this decision, on the ground that there was no dispute before the Board of which by Title III of the Transportation Act the Board was given jurisdiction. After a rehearing the Board confirmed its original decision. The action of the Company in refusing to comply with the decision of the Board as to the manner of holding the elections led to a vote among the members of the Federation No. 90 as to whether they should strike against the Company because of such vote. There was an affirmative vote and some 20,000 struck. A bill was brought by the Pennsylvania Company to enjoin the Labor Board from hearing the controversy instituted by Federation No. 90 over the election of representatives who should act for the employees in the conferences proposed with the Company. It was first objected that the Federation No. 90 had no standing or capacity to invoke the hearing of the dispute because a labor union; second, that the controversy did not involve the kind of dispute of which the Board could take cognizance under the Act, because the question who should represent the employees as to grievances, rules and working conditions was not within the jurisdiction of the Labor Board to decide; and, third, the Board had no right to publish its opinion condemning the action of the Company as it proposed to do, because that only applied to final decisions of a dispute over wages or working conditions. The position of the Company was not sustained by this Court. It was held that a labor union could invoke the Board's action, that the question who should be recognized as representatives of the employees was not only before the Board but involved one of the most im-

portant of the rules and working conditions in the operation of a railroad, and that such a decision could therefore be made public if the Board deemed it wise and proper. The District Court in which the suit was brought had enjoined the Labor Board from hearing the dispute and from publishing its opinion. Notwithstanding the opinion of the Board, the Pennsylvania Company proceeded to carry out its original method of selecting employees' representatives and their regional distribution. It refused to allow its employees to vote for the Federation No. 90 as their representative, and where ballots were cast, as happened in some of the voting places, for the Federation No. 90 in a great majority, individuals, though they had but a small minority of votes, were declared elected as representatives by the Company. The Company's plan brought together in the organizations an equal number of officers and of employees' representatives, with the restriction that no action should be taken indicating agreement unless two-thirds of the body acting should concur. The Company paid the expenses of the organizations and such permanent officers as they had were put upon the pay roll of the Company. It instituted a trade organization with which the Company proposed to deal and has dealt, although the evidence conclusively showed that it did not, at the time of the election certainly, represent a majority of the employees. The Company and the employees whom it recognized as the representatives of its employees came to an agreement in respect to wages and working conditions and have induced many employees to sign such agreement. This agreement took effect as of July 1, 1921.

The bill in this case was filed to enjoin what was charged to be a conspiracy by the Pennsylvania Company and its officers to defeat the provisions of the Act and deprive the employees of their rights with which the provisions of Title III of the Act intended to vest them in their deal-

ings with the Company; averring that in the effort to deprive them of their proper representation and to maintain the plan of the Company, the Company resorted to coercion with threats of discharge, and further violated their rights by preventing a large number of employees who were furloughed from casting their vote in the elections.

The complainants further contend, first that all furloughed employees, who in July, 1921, were refused reëmployment in accordance with their seniority rights, should recover wages for the time the Company has denied them reëmployment at former wages; that employees who, having worked a year from July, 1921, to July, 1922, were discharged by the Company for refusing to waive their rights under the Transportation Act, were entitled to recover the difference between the rate paid and what they were entitled to under a wage decision of the Board in June, 1921; and, finally, that a large number of the Company's employees, members of Federation No. 90, who were not furloughed in 1921 and did not strike in the summer of 1922, but continued at work under the wages, rules and conditions established by the Company's alleged unlawful agreement, are entitled to be paid by the Company the difference between the amounts actually received by them and the amount they should have received at the rate of wages in force before the first of July, 1921. The contention is that complainants in this their representative suit and as incident to the main relief sought by injunction, may have an accounting of damages sustained by the members of the Federation No. 90 in the premises.

The prayer of the bill is for a decree enjoining the defendant, the Pennsylvania Company, from enforcing the provisions of the agreement with respect to wages and working conditions made as of July 1, 1921, between it and its employees under its plan on the vote taken, from en-

forcing any change in rules and working conditions as they existed on June 30, 1921, that is as they existed under a previous national agreement entered into while the property was under federal control, from continuing to deal with persons chosen on the Company's ballots as the representatives of the employees engaged in mechanical work, and from financing, interfering with, directing and controlling the organizations of the Company's employees for the purposes set forth in the Transportation Act, and from refusing to confer and deal with Federation No. 90 as the organization representing the great majority of the Company's employees engaged in such work.

The whole case for Federation No. 90 rests upon the contention that the conduct of the Company and its officers is a statutory offense in the nature of a conspiracy under the provisions of Section 19 of the Criminal Code, which provides that if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the laws of the United States, they shall be punished; and further that injunction will lie to restrain the means for promoting such conspiracy. Moreover, it is claimed that this is a conspiracy at common law, because it is a combination to accomplish an unlawful result by unlawful means, and actionable. Citing *Pettibone* v. *United States,* 148 U. S. 197, and *Duplex* v. *Deering,* 254 U. S. 465. The whole issue, therefore, is whether the provisions of Title III, in pointing out what Congress wished the parties to the dispute to do, was intended by Congress to be a positive, obligatory law, creating an enforceable duty such that a combination by the Company and its officials to violate it is a conspiracy. Title III we have already construed in the *Labor Board Case* in 261 U. S. 72. We quote from the statement in that case:

"Title III of the Transportation Act of 1920 bears the heading 'Disputes Between Carriers and their Employees and Subordinate Officials'.

"Section 301 makes it the duty of carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided 'in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute'.

"The section concludes—

"'If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions this title is authorized to hear and decide such dispute'.

"Section 302 provides for the establishment of railroad boards of adjustment by agreement between any carrier, groups of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof. No such boards of adjustment were established when this controversy arose.

"Section 303 provides for hearing and decision by such boards of adjustment upon petition of any dispute involving only grievances, rules or working conditions not decided as provided in Sec. 301.

"Sections 304, 305 and 306 provide for the appointment and organization of the 'Railroad Labor Board' composed of nine members, three from the Labor Group, three from the Carrier Group, and three from the Public Group.

"Section 307(a) provides that when a labor adjustment board under Sec. 303 has not reached a decision of a dispute involving grievances, rules or working conditions in a reasonable time, or when the appropriate adjustment board has not been organized under Sec. 302, the Railroad Labor Board '(1) upon the application of the chief execu-

tive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules or working conditions which is not decided as provided in section 301'.

"Paragraph (b) of the same section provides for a hearing and decision of disputes over wages.

"Paragraph (c) makes necessary to a decision of the Board the concurrence of five members, of whom, in the case of wage disputes, a member of the Public Group must be one. The paragraph further provides that

"'All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board and the [Interstate Commerce] Commission, and shall be given further publicity in such manner as the Labor Board may determine.'

"Paragraph (d) requires that decisions of the Board shall establish standards of working conditions which in the opinion of the Board are just and reasonable.

"Section 308 prescribes other duties and powers of the Labor Board, among which is that of making 'regulations necessary for the efficient execution of the functions vested in it by this title'.

"Section 309 prescribes that

"'Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel'.

" Section 313 is as follows:

" ' The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.' "

This Court's construction of the effect of these provisions is shown in the opening language of the opinion, as follows:

(Page 79.) " It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first, by conference between the parties; failing that, by reference to adjustment boards of the parties ' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses

public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

Another passage is as follows:

(Page 83.) "The second objection is that the Labor Board in Decision 119 and Principles 5 and 15, and in Decision 218, compels the Railroad Company to recognize labor unions as factors in the conduct of its business. The counsel for the Company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which can not be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the Company to restrict them in their selection to employees of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed.

"But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to coöperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for coöperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which,

in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision."

A third passage is as follows:

(Page 85.) " It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the Railway Company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory coöperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties."

It is clear from this language that in the *Labor Board Case* this Court has decided that there is nothing compulsory in the provisions of the statute as against either the Company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law. The language of the Title is a legal definition of the jurisdiction and duty of the Railroad Labor Board in attempting to settle the controversies between the railroad employer and its employees, and where the Labor Board exceeds its jurisdiction and violates the provisions describing its functions, it

may be subject to judicial restraint at the complaint of any properly interested party. The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation or some other means of compulsion, and there were not the other provisions of the Title to help its construction, be given the force of a statutory obligation of the parties to a dispute. There are two Sections, 310 and 311, in this Title, which do furnish instances of judicial compulsion in the matter of securing evidence and the production of records to promote the efficient administration of the functions vested in the Labor Board by the Title. And there is Section 312 which required that carriers until September 1, 1920, should continue to pay wages not less than those paid March 1, 1920, and fixed a penalty for each violation of this obligation and gave a right to the United States to a civil suit to recover the penalty. But when the other sections of the Title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion.

What the complainants here are seeking to do is to enforce by mandatory injunction a compliance with a decision of the Board, not based on the legal rights of the parties, but on its judgment as to what legal rights the disputants should surrender or abate in the public interest and in the interest of each other, to maintain harmonious relations between them necessary to the continuance of interstate commerce, and to avoid severing those relations as they would have the strict legal right to do. Such a remedy by injunction in a court, it was not the intention of Congress to provide.

The ultimate decision of the Board, it is conceded, is not compulsory, and no process is furnished to enforce it,

but it is urged that the preliminary steps are not the final decision, and it will make the Act meaningless and wholly ineffective if under the Act the parties may not be forced to a conference and to a contest before the Labor Board. This very point was considered by us in the *Labor Board Case* and we held that the questions how the representatives of each side should be selected and whom the Board should recognize as accredited representatives were of primary importance affecting the working conditions of the railroad, and such decisions, therefore, must be regarded, although preliminary, as of the same class of decisions as those with respect to wages and ultimate working conditions. The same sanction, therefore, of publication and public opinion, exists for them and nothing else.

The Pennsylvania Company is using every endeavor to avoid compliance with the judgment and principles of the Labor Board as to the proper method of securing representatives of the whole body of its employees, it is seeking to control its employees by agreements free from the influence of an independent trade union, it is, so far as its dealings with its employees go, refusing to comply with the decisions of the Labor Board and is thus defeating the purpose of Congress. Appellants charge that the Company is attempting, by threats to discharge its employees, to secure their consent to the agreement of July 1, 1921, as to wages and working conditions agreed to by the representatives of its employees it declared elected. This is denied, though there is some evidence tending to support the charge. All these things it might do and remain within its strict legal rights after it came fully into control of its railroad property subsequent to September 1, 1920. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable. Therefore, the bill of complaint does not aver a conspiracy and without that, equitable relief can not be granted.

We come now to the prayer for an allowance of damages to Federation No. 90, suing on behalf of its members. The claims are, first, for certain employees who, being on furlough when they were notified to return to work on a scale of wages made effective by the Company July 1, 1921, refused to return except on the old scale prevailing September 1, 1920. They seek wages on the old scale though they did not work. Second, for certain employees who worked under this Company scale for a year and then struck. They seek a recovery for the difference between the old and the new scale established by the Company. Third, for certain employees who did not strike at all and accepted wages at the new scale till the filing of the bill. They seek recovery for the difference between the old scale and the new scale which they accepted.

It is argued that the new scale was illegal because not fixed by the Labor Board under Title III after a hearing and therefore the only legal scale was that which prevailed before. We do not find it necessary to consider these claims on their merits. Even if the Federation No. 90 and its members as representatives in a class suit in equity could recover such claims as damages incidental to granting the main equitable relief prayed for, the denial of the prayer for the equitable relief and the dismissal of the main part of the bill carries with it such incidental claims without prejudice to their prosecution at law by individual claimants as they may be advised. Our conclusions on the merits of the main issue and the damage claims have made it unnecessary for us to consider objections made to the representative capacity of the complainants to maintain the bill.

Decree affirmed.

PENNSYLVANIA SYSTEM BOARD OF ADJUSTMENT OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS ETC. *v.* PENNSYLVANIA RAILROAD COMPANY ET AL.

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

No. 629. Argued January 13, 1925.—Decided March 2, 1925.

Decided upon the authority of *Pennsylvania Federation* v. *Penna. R. R. Co., ante,* p. 203.
Affirmed.

Mr. Henry T. Hunt for appellant.

Mr. John Hampton Barnes for appellees.

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

This case turns on substantially the same questions as those just decided in *Pennsylvania Federation No. 90* against the same defendant, *ante,* p. 203. It is a bill in equity by a trade union called The Pennsylvania System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, made up of several classes of employees, clerical and otherwise, of the Pennsylvania Railroad, seeking to enjoin the Company from maintaining the same kind of alleged conspiracy as that described and complained of by Federation No. 90 in the previous case. There is no prayer in the bill in this case for damages as there was in the other, but the circumstances and the law sought to be applied to them are in every respect similar. As in the previous case, elaborate briefs were filed to justify the contention that Title III of the Transportation Act vested the employees of the Pennsylvania Road with definite rights, the violation of which constituted a

legal wrong and that on these a charge of conspiracy could be predicated, and a remedy by injunction might be had in behalf of the complainants. For the same reasons as those stated in the previous case, the same conclusion must be reached. The Circuit Court of Appeals and the District Court were therefore right in dismissing the bill. The decree is

Affirmed.

UNITED STATES *v.* STEAMSHIP "COAMO," HER ENGINES, ETC., ET AL.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 47. Argued October 8, 1924.—Decided March 2, 1925.

Section 10 of the Immigration Act, 1917, makes it the duty of any person, including owners, officers and agents of vessels, bringing in an alien, to prevent his landing at a time or place other than as designated by the immigration officers, and punishes failure to comply by a fine in each case of not less than $200 nor more than $1,000, or by imprisonment, or both, but provides that if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute such person, owner, etc., "a penalty of $1,000 shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court."

Held, that where a vessel is so libeled, the penalty is $1,000, neither more nor less, for each alien landing from it in violation of the section. P. 221.

QUESTION certified by the Circuit Court of Appeals, in a libel for violation of the Immigration Act. See 292 Fed. 1016.

Mr. Assistant Attorney General Otis, with whom *Mr. Solicitor General Beck* and *Mr. George Ross Hull,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Ray Rood Allen, with whom *Mr. Charles C. Burlingham* was on the brief, for the Steamship " Coamo."

MR. JUSTICE HOLMES delivered the opinion of the Court.

The Immigration Act of February 5, 1917, c. 29, § 10; 39 Stat. 874, 881, makes it the duty of every person, including owners, officers, and agents of vessels or transportation lines, &c., bringing aliens to ports of the United States to prevent the landing of such aliens at any time or place other than as designated by the immigration officers, and failure to comply with the requirements of the section is made a misdemeanor punishable by a fine of not less than $200 or more than $1,000, or by imprisonment or by both. " Or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of $1,000 shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court." The United States libeled the Coamo for a violation of this section by a failure to deliver two aliens at the designated place, Ellis Island, and to prevent their landing elsewhere. The District Court found the violation, but held that $1,000 was simply the upward limit and imposed a penalty of $200 for each alien. The libellant appealed demanding $1,000 for each. The Circuit Court of Appeals certifies the question whether in such a case the trial court is " bound as a matter of law to pass a decree condemning said vessel for a penalty of exactly $1,000, neither more or less, for each alien landing from said vessel in violation of said section of said statute."

We are of opinion that the language of the statute is too definite to be escaped by construction. After dealing with the personal liability of owners and agents of vessels and transportation lines, the section passed to another matter,

the liability of vessels. It provides a remedy against them irrespective of any fine that may have been incurred by owners or agents. The liability is not a security for any such fine, it is a new one. The statute does not say that the fine or penalty previously mentioned shall be a lien upon the vessel but that a penalty of $1,000 shall be. It seems to us as plain that this is the sum to be demanded as it is that the right to demand it does not depend upon a conviction of the owner or agent of the ship. See *The Scow 6-S,* 250 U. S. 269, 272. The earlier part of this section and other sections of the Act simply fix limits and leave discretion as to the amount within the limit or limits fixed. In §§ 35, 36, discretion is given to the Secretary of Labor. But here the statute allows only one judgment in case of guilt. We answer the question

Yes.

FLANAGAN *v.* FEDERAL COAL COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 75. Argued October 15, 1924.—Decided March 2, 1925.

1. A contract of sale between two coal dealers for delivery of coal by the one to the other in car load lots, f. o. b. cars at the mine where produced is a transaction in interstate commerce not subject to be invalidated by a license law of the State, if the buyer, though entitled to stop the coal when so delivered, in practice buys it for shipment to his customers in other States and procures such shipment by orders under which the seller takes bills of lading, in the buyer's name, from the railroad at the mine and consigns the coal to such customers. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282. P. 225.

Reversed.

CERTIORARI to a judgment of the Supreme Court of Tennessee which affirmed a judgment against the petitioner in his action for breach of a contract to purchase coal.

Mr. James J. Lynch, with whom *Mr. Claiburn H. Garner* was on the brief, for petitioner, relied chiefly on the following cases: *Lemke* v. *Farmers Grain Company,* 259 U. S. 50; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Railroad Commission* v. *Texas, etc.* 229 U. S. 336; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.* 227 U. S. 111; *Board of Trade* v. *Olsen,* 261 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495; *Swift & Co.* v. *United States,* 196 U. S. 375; *Eureka Pipe Line* v. *Hallanan,* 257 U. S. 265; *United States Fuel Gas Co.* v. *Hallanan,* 257 U. S. 277; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Heyman* v. *Hays,* 236 U. S. 176.

Mr. Chas. C. Moore for respondent, cited and relied chiefly upon: *Nathan* v. *Louisiana,* 8 How. 73; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Ware* v. *Mobile County,* 209 U. S. 406; *Transportation Co.* v. *Wheeling,* 99 U. S. 273; *Howe Machine Co.* v. *Gage,* 100 U. S. 679; *Woodruff* v. *Parham,* 8 Wall. 123; *Walling* v. *Michigan,* 116 U. S. 446; *Cornell* v. *Coyne,* 192 U. S. 418; *Heisler* v. *Thomas Colliery,* 260 U. S. 256; *Coe* v. *Errol,* 116 U. S. 517; as illustrating conditions under which property at rest is subject to local taxation, and as authority for the proposition that the coal which Flanagan was selling to the Federal Coal Company was subject to taxation in his hands up to the moment title passed out of him.

There is a wide difference between a sale by a single dealer in grain or live stock, and the organization of a grain exchange, or stock yards, controlling the movement in commerce of a large part of the grain, or live stock, grown in the country.

The principle that the contract must necessarily involve in its execution transportation across state lines in order to be a part of interstate commerce was aptly stated in *United States* v. *Addyston Pipe Co.,* 85 Fed. 298.

Undoubtedly the Federal Coal Company in buying this coal was engaged in interstate commerce. But, if the sale and delivery of the coal by Flanagan was for that reason interstate commerce, then its purchase by him must for the same reason be interstate commerce, because he could not sell and deliver it without first buying it. By the same reasoning the mine operator in selling to him, in mining the coal and employing miners for the purpose, was engaged in interstate commerce, because each was an essential prerequisite of the other.

The Tennessee Supreme Court in construing and applying this local revenue statute in this case has said that the tax is levied not upon the sale but upon the business of dealing, which embraces both buying and selling. The court ruled that Flanagan might sell coal produced by him without paying the tax. He became subject to the tax, not because he made this sale to the Federal Coal Company, but because he engaged in the business of buying and selling coal. While paying the tax, Flanagan had the right to sell and did sell coal to local users. The sale of a part of it to the Federal Coal Company which it shipped out of the State was only an incident of the local business being conducted. The tax is not levied upon the sale for foreign shipment. Even if petitioner Flanagan had engaged exclusively in selling to foreign customers, he would have been charged no higher tax than a competitor engaged exclusively in selling to local customers. There was no discrimination.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit for breach of a contract to purchase coal. The only question here is whether the State Courts erred in holding that the plaintiff (Flanagan, the petitioner) could not recover for an undeniable breach because at the time when the defendant, the Federal Company, refused to accept the coal the plaintiff's license as a coal dealer had

expired. The plaintiff says that the transaction was interstate commerce and therefore not subject to such regulation by state laws.

The contract was made on August 19, 1920, and bound the plaintiff to deliver and defendant to accept approximately two hundred cars of Tracy City run of mine coal at nine dollars per ton f. o. b. cars mines, i. e., at Tracy City, Tennessee. Shipments to be approximately fifty cars per month. Time, September 1, 1920, to December 31, 1920. Payments to be made weekly for coal shipped in previous week. The Federal Coal Company bought to sell again. It did not receive the coal itself but gave orders to Flanagan who took bills of lading from the Railroad Company at Tracy City in the name of the Federal Coal Company and consigned the coal to that Company's customers in other States as directed. The Company usually did not sell in Tennessee. It broke off its contract because the price of coal went down and, as it said, its customers refused to keep to their bargains in their turn.

There was some discussion below to show that Flanagan also bought this coal as a dealer and so was subject to the law in respect of this transaction. But for the present purpose it is immaterial how he came by what he sold. For if he was engaged in interstate commerce he could not be impeded because he was a dealer any more than if he was selling from his own mine. It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other States. Very likely the Federal Coal Company might have stopped the coal at Tracy City in Tennessee, but it had no thought of doing so and Flanagan understood the course of business in which he was expected to coöperate and did coöperate. Therefore in this matter the parties were engaged in interstate commerce and the state law even if valid as a tax could not invalidate their contract. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282,

290. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50. *A. G. Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 69, 70. We see no sufficient reason for believing that the decision would have been the same if the State Court had regarded the transactions as interstate commerce and therefore its decision must be reversed.

Judgment reversed.

STEIN ET AL., DOING BUSINESS UNDER THE FIRM NAME OF STEIN, HALL & COMPANY, ETC. *v.* TIP-TOP BAKING COMPANY.

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

No. 177. Submitted January 14, 1925.—Decided March 2, 1925.

In an action in the District Court between citizens of different states wherein plaintiff seeks to recover the agreed price of goods which defendant agreed to buy but refused to accept, and where plaintiff alleges that upon defendant's refusal plaintiff rescinded the contract and, in his own right, retook the goods, which then had no value and could not be sold, and a year later, when they had acquired value, resold them as his own to a third person for a price alleged, the price received at the resale is not to be deducted from the plaintiff's demand in determining whether the jurisdictional amount is in controversy. P. 227.

Reversed.

ERROR to a judgment of the District Court dismissing an action on contract for want of jurisdiction.

Mr. Charles Carroll for plaintiffs in error. *Mr. Sigmund W. David, Mr. W. S. Hefferan, Jr.,* and *Mr. Richard Priest Dietzman* were also on the brief.

Mr. Allen P. Dodd for defendant in error. *Mr. George Du Relle* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action to recover damages for breach of a contract to purchase 80,000 pounds of Badex, a foodstuff. The defendant demurred because, as it alleged, the petition showed that the amount in controversy, exclusive of interest and costs, did not exceed the sum of three thousand dollars, and the action was dismissed by the District Court on that ground. Judicial Code, § 24. The case comes here on that single question, as determining the jurisdiction of the District Court.

The material allegations are that the agreed price was $5800; that at the time of the breach no price could be got for the goods and that they had no value then in the market or elsewhere; that upon the breach the plaintiffs took possession of them as their own, and that nearly a year later they sold the same as their own to third persons for $4521.95, but it is expressly denied that the plaintiffs sold on behalf of the defendant. The position of the defendant is that the price realized, even if diminished by transportation charges of $620.45, must be deducted from the contract price and leaves less than $3000. We presume that the District Court took the same view, although its opinion referred to in the judgment is not printed, as it should have been. Rule 8. But obviously the plaintiffs have a claim that can not be dismissed as absurd, and on which they are entitled to the judgment of the Court. Their allegations are that on the unjustified refusal of the defendant to accept the Badex they rescinded the transaction, and they argue that when they did so their rights against the defendant became fixed and that what they may have done a year afterwards was wholly their own affair. The cases where instead of rescinding the seller sells for the buyer's account have no application. The breach of contract occurred in Louisville, Kentucky, where possibly the contract was made. If the case is governed

by the law of that State, as to which it would be premature to express an opinion, we infer that the plaintiffs' argument probably would be regarded as correct. *Zinsmeister* v. *Rock Island Canning Co.*, 145 Ky. 25, 31. See further *Dustan* v. *McAndrew*, 44 N. Y. 72, 78; *Van Brocklen* v. *Smeallie*, 140 N. Y. 70, 75. At all events the plaintiffs are entitled to try their case.

Judgment reversed.

KAPLAN *v.* TOD, COMMISSIONER OF IMMIGRATION.

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

No. 241. Argued January 26, 1925.—Decided March 2, 1925.

1. Section 2172 of the Revised Statutes, by which naturalization of parents extends to minor children "if dwelling in the United States," does not apply where a child was rightly denied entry as a feeble-minded person and ordered deported but permitted, under special safeguards, to remain in this country with her father while the deportation was temporarily suspended because of the late war. P. 229.
2. Under the above circumstances, the alien, properly speaking, has not "entered" the United States and is not "found" there but is in custody at the limit of jurisdiction awaiting the order of the authorities; consequently the limitation of five years upon liability to deportation (Act of February 5, 1917, c. 29, §19, 39 Stat. 889) is inapplicable. P. 230.

Affirmed.

APPEAL from an order of the District Court dismissing a petition for *habeas corpus*.

Mr. James Marshall, with whom *Mr. Louis Marshall* was on the brief, for appellant.

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

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order dismissing a petition of the appellant for a writ of *habeas corpus*. The petition alleges that the petitioner is a citizen of the United States, and that she is unlawfully detained by the respondent under a warrant of deportation issued by the Assistant Secretary of Labor, without jurisdiction and without due process of law contrary to the Fifth Amendment of the Constitution of the United States. An appeal was taken directly to this Court on the alleged infringement of the appellant's constitutional rights. *Chin Yow* v. *United States,* 208 U. S. 8, 13. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284.

The appellant was born in Russia. On July 20, 1914, being then about thirteen years old, she was brought to this country, where her father already was, by her mother. Upon examination she was certified to be feeble minded, and was ordered to be excluded, but before the order could be carried into effect the European war had begun. Deportation necessarily was suspended, and she was kept at Ellis Island until June, 1915. In the latter half of that month she was handed over to the Hebrew Sheltering and Immigrant Aid Society upon its undertaking to accept custody of the child until she could be deported safely, to return her when required, and meanwhile to prevent her becoming a public charge. The Society allowed her to live with her father, which she has done ever since. On December 14, 1920, her father was naturalized, she being then about nineteen. The warrant of deportation was issued on January 19, 1923; the writ of *habeas corpus* was allowed on April 24, and was dismissed on the following October 9.

It is not questioned that the appellant rightly was denied admission in July, 1914, or that she is feeble minded

still. Act of March 26, 1910, c. 128; 36 Stat. 263. But it is said that she became a citizen by the naturalization of her father while she was a minor and in this country, Rev. Stats. § 2172, and that she cannot be deported upon a warrant issued more than five years after her entry into the United States. Act of February 5, 1917, c. 29, § 19; 39 Stat. 874, 889; Act of February 20, 1907, c. 1134, § 20; 34 Stat. 898, 904. The answers to both arguments are much the same. Naturalization of parents affects minor children only "if dwelling in the United States." Rev. Stats. § 2172. The appellant could not lawfully have landed in the United States in view of the express prohibition of the Act of 1910 just referred to, and until she legally landed "could not have dwelt within the United States." *Zartarian* v. *Billings,* 204 U. S. 170, 175. Moreover while she was at Ellis Island she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. *United States* v. *Ju Toy,* 198 U. S. 253, 263. When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, the nature of her stay within the territory was not changed. She was still in theory of law at the boundary line and had gained no foothold in the United States. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 661. She never has been dwelling in the United States within the meaning of the Act. Still more clearly she never has begun to reside permanently in the United States within the later Act of March 2, 1907, c. 2534, § 5; 34 Stat. 1229. *United States ex rel. Patton* v. *Tod,* 297 Fed. 385, affirming s. c. 292 Fed. 243. *United States ex rel. De Rienzo* v. *Rodgers,* 185 Fed. 334.

The later of the limitation acts, the Act of February 5, 1917, c. 29, § 19, 39 Stat. 874, 889, applies to 'any alien who at the time of entry was a member of one or more of the classes excluded by law' and to 'any alien who shall have entered or who shall be found in the United

States in violation of this Act.' For the reasons already stated the appellant never has entered the United States within the meaning of the law, and is not properly described in the warrant as 'found in the United States in violation of the immigrant authorities.' Theoretically she is in custody at the limit of the jurisdiction awaiting the order of the authorities. It would be manifestly absurd to hold that the five years run in favor of one held at Ellis Island for deportation, and as we have said the position of the appellant is the same.

Order affirmed.

FORT SMITH SPELTER COMPANY *v.* CLEAR CREEK OIL & GAS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 266. Submitted January 28, 1925.—Decided March 2, 1925.

Where a private gas company, empowered to become a public service corporation, changed its status accordingly and exercised the power of eminent domain soon after it had contracted to furnish future supplies of gas to a consumer, and the face of the contract, and attendant circumstances, showed that this change was in contemplation when the contract was made, *held* that an order of a state commission allowing the company increased rates was not an unconstitutional impairment of the contract. P. 232.

161 Arkansas 12, affirmed.

ERROR to a judgment of the Supreme Court of Arkansas which sustained an order of the State Corporation Commission allowing the defendant in error gas company to increase its rates. See 161 Ark. 12; 153 *Id.* 170; 148 *Id.* 260.

Mr. Tom M. Mehaffy, Mr. James W. Mehaffy and *Mr. James S. Holt* for plaintiff in error.

Mr. Joseph M. Hill and *Mr. Henry L. Fitzhugh* for defendant in error. *Mr. Thomas B. Pryor* and *Mr. Vincent M. Miles* were also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The Clear Creek Oil & Gas Company, a corporation of Arkansas, petitioned the Corporation Commission of the State for an increase of rates for gas used by smelters and the like. The Fort Smith Spelter Company objected on the ground that it received the gas under a private contract made by the Gas Company, when it was a private corporation, with two men to whose rights the Spelter Company had succeeded; and that therefore the contract was not subject to the modification asked. The Commission increased the rate and after intermediate proceedings the order of the Commission was affirmed by the Supreme Court of the State. 161 Ark. 12; s. c. 153 Ark. 170; 148 Ark. 260. The case is brought here by writ of error on the ground that the order is a law impairing the obligation of contracts. *Louisville & Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298, 318.

The Supreme Court decided that the Gas Company had power under the laws of the State to become a public service corporation but was not bound to do so. Soon after the contract in question was made the Gas Company did become such a corporation and as such exercised the power of eminent domain. The Supreme Court held that if the contract was made when the Company had not yet devoted itself to the public service still the instrument on its face and also the circumstances showed that public service on the part of the Company was contemplated with the consequence that the Company and all its contracts would become subject to public regulation. We see no sufficient reason for disturbing this finding. As was said below, the fact that the gas was to be delivered at Fort Smith, eighteen to twenty miles from the gas field specified in the agreement, showed that a pipe line would be necessary, which in the ordinary course of events would require the exercise of eminent domain. The gas field

was large and additions were agreed for. The contractors were entitled to call for one hundred and fifty million cubic feet of gas for each thirty days, with a possible extension up to three hundred million. They were given the 'first call' upon the Company's gas supplies and it was agreed that if the Company should sell gas to consumers, except churches, schools, hospitals, or charitable institutions, at a rate less than that fixed by the contract there should be a corresponding reduction. Everything in short pointed to a very extensive enterprise which hardly would be possible without the power incident to this public service under the laws of the State. It would be most unusual, as all know, for such a Company to attempt to work in any other way. It already had franchises in several towns and cities to supply gas.

Judgment affirmed.

A. B. SMALL COMPANY *v.* AMERICAN SUGAR REFINING COMPANY.

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

No. 101. Argued October 22, 1924.—Decided March 2, 1925.

1. Written orders for goods, addressed to a sugar refiner, and written acceptances by the latter, compared and construed, in the light of the parties' conduct, and *held* free from variances alleged to prevent their forming completed contracts. P. 235.
2. In construing a typewritten document, a mistake of the typist by transferring the concluding clause of one sentence to the beginning of the next, thus altering the literal meaning, may be corrected to conform to the context and the sense of the whole and to the conduct of the parties. P. 236.
3. Section 4 of the Act of August 10, 1917, amended October 22, 1919, known as the Lever Act, which provides that it shall be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for

any necessaries," and which has been adjudged violative of the due process clause of the Fifth Amendment as applied to criminal prosecutions, (*United States* v. *Cohen Grocery Co.* 255 U. S. 109,) is likewise invalid as a test of the validity of a contract for the sale of a commodity (e. g. sugar,) because in either case the standard of duty set up is so vague and indefinite as really to be no rule or standard at all. *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, distinguished. P. 237.

4. Section 5 of the Lever Act did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned. P. 242.
5. Section 6 of the Lever Act, though prohibiting wilful hoarding and also certain acts done for the purpose of unreasonably increasing or diminishing prices, did not prohibit a selling for delivery more than 30 days in the future. P. 243.
6. The duty of a seller upon retaking goods for sale on the buyer's account is to make the resale fairly in a reasonably diligent effort to obtain a good price. P. 244.
7. Evidence, on the part of the buyer, of particular sales of like goods by others at higher prices than that obtained by the seller's resale of the goods in question, *held* rightly excluded from the jury, both because the seller was not obliged to obtain the best price possible, and because the other sales, due to circumstances disclosed, did not tend to establish a standard by which the fairness of the resale could be judged. *Id.*
8. The duty of a seller to resell goods under a vendor's lien does not arise until he takes possession under it; and the reasonable time permitted for reselling does not begin to run until then. P. 246.

Affirmed.

ERROR to a judgment of the District Court recovered by the plaintiff in an action upon two contracts for the sale of sugar, which the defendant broke by refusing to accept the sugar when delivered.

Mr. Edgar Watkins, with whom *Mr. Frederick T. Saussy, Mr. Mac Asbill* and *Mr. Horace Russell* were on the brief, for plaintiff in error.

Mr. Orville A. Park, with whom *Mr. J. F. Abbott* and *Mr. Ralph Crews* were on the brief, for defendant in error.

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

This was an action to recover for the breach of two contracts for the sale by a sugar refiner to a wholesale dealer of 35,000 pounds of refined sugar—the breach consisting in the buyer's refusal to accept the sugar when delivered. The plaintiff secured a verdict and judgment in the District Court; and the defendant prosecutes this direct writ of error, a constitutional question, among others, being involved.

The contracts were alleged to have arisen out of written orders from the wholesale dealer and written acceptances by the refiner. Whether the acceptances conformed to the orders, and so resulted in contracts, was questioned by a demurrer to the petition, and also at the trial, and is the first matter presented by the assignments of error. The defendant asserts that there was a material variance in three particulars. One is that the orders contained no designation of the place from which the sugar was to be shipped, while the acceptances named New Orleans as the place. This closely approaches a mere quibble. The orders were addressed to the refiner at New Orleans and expressly gave it an option to ship from any of its refineries, one of which was at New Orleans. So, in naming that place as the one from which shipment would be made, the acceptances were in accord with the orders. Another asserted difference is that the orders fixed one price for the sugar, while the acceptances fixed another price. This is equally without substance. In the acceptances the basis on which the price was calculated was described a little differently from what it was in the orders; but there was

no difference in meaning. Besides, the price calculated on the indicated basis was set out in the price column in the orders and in the acceptances, and was the same in both. Lastly it is said that the orders gave the refiner a conditional right to supply such grades of sugar as it might have available at the time of shipment, while the acceptances omitted the words of condition and made the right absolute. This point, although having more color than the other two, must fail for reasons which will be stated.

The orders and acceptances were both prepared by the refiner—a circumstance strongly suggesting they were intended to be in accord. After the acceptances were given, both parties in several ways affirmatively treated the orders as effectively accepted. Not until this action was brought was a variance suggested. In such circumstances a court should be solicitous to find, as the parties evidently did before they became hostile, an accord between the two instruments.

The orders were given in July, 1920, and called for shipment of the sugar during September of that year. They set forth carefully the assortment of packages and grades of sugar desired, with the particular price of each, and then said:

"Barrels or equivalent at price of 22½ cents, assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make. In event assortment is not furnished prompt seller reserves right to ship such grades as it has available at the time of shipment."

The acceptances set forth the assortment of packages and grades, with prices, in the same way, and then said:

"Seller reserves right to ship such grades as it has available at the time of shipment."

This provision in the acceptances is well constructed and can have but one meaning. But not so of the provision quoted from the orders. In any view it is neither gram-

matical nor rightly punctuated. It was typewritten, and probably was prepared with the idea that the assortment of packages and grades would not be embodied in the orders, but would be furnished by the buyer later on. In fact, as just shown, the assortment was set forth in the orders. But, putting this aside, the context and the sense of the whole provision indicate that the clause, " in event assortment is not furnished prompt," was intended to be a part of and to qualify what precedes it rather than what follows. If that was the meaning intended, a mistake in punctuation by the typist should not be permitted to defeat it. *Ewing* v. *Burnet,* 11 Pet. 41, 54; *Hammock* v. *Farmers' Loan and Trust Company,* 105 U. S. 77, 84. The parties evidently treated it as the true meaning when the orders and acceptances were given, for their acts already recited have no other explanation. There is ample warrant therefore for regarding the full provision as reading:

" Barrels or equivalent at price of 22½ cents. Assortment to be furnished seller by buyer before September 1, 1920, but subject to such substitutions as seller may find necessary to make in event assortment is not furnished promptly. Seller reserves right to ship such grades as it has available at the time of shipment."

In this view the orders and acceptances contained the same reservation of a right to ship available grades. A like conclusion in a like situation was reached by the Circuit Court of Appeals for the Fifth Circuit in *American Sugar Refining Co.* v. *Newnan Grocery Co.,* 284 Fed. 835.

To avoid any misapprehension, it is well to state at this point that, in fact, the refiner delivered the assortment of packages and grades specified in the orders and repeated in the acceptances.

In its answer the defendant set up two defenses expressly based on the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, as amended by the Act of October 22, 1919, c. 80, 41 Stat. 297, and on orders and regulations made there-

under. One defense was to the effect that the plaintiff was not entitled to "more than one cent per pound profit on what the sugar cost, which was the *prima facie* reasonable profit fixed by the President," and in no event was entitled to "more than a reasonable profit." The other defense was to the effect that the contracts were unlawful, because they provided for delivery at a future time, more than thirty days away, and thereby "tended to increase the price of sugar and to promote the hoarding thereof." Each of these defenses was challenged by a demurrer on the grounds, first, that the facts alleged were not sufficient to constitute a defense under the Lever Act, and, secondly, that that Act was in conflict with the Fifth Amendment to the Constitution and void. The demurrers were sustained on the second ground; and the defendant assigns error on that ruling.

As the Lever Act is a long one with various provisions, we assume that the District Court's ruling was confined to certain provisions in sections 4, 5, and 6, for they are all that could have any bearing. Section 25, mentioned in the briefs, related only to coal and coke. Section 1, likewise mentioned, provided for the issue of regulations and orders to carry out other sections, but did not alter or enlarge their prohibitions or requirements.

Section 4 provided it should be "unlawful for any person wilfully . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries," or to agree with another "to exact excessive prices for any necessaries." In a series of cases, of which *United States* v. *Cohen Grocery Company*, 255 U. S. 81, and *Weeds Inc.* v. *United States*, 255 U. S. 109, are examples, this Court held that provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what

it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms "unjust," "unreasonable" and "excessive" as applied to prices by that provision had no commonly recognized or accepted meaning. The ground of the decision is reflected by the following excerpt from the opinion in the first case (255 U. S. 89):

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes [by court and jury after the act] to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings. *Standard Chemicals, etc., Corporation* v. *Waugh Chemical Corporation,* 231 N. Y. 51, 54; *Dunman* v. *South Texas Lumber Co.,* 252 S. W. 274, 275. In the first of these citations, the

Court of Appeals of New York, referring to this Court's ruling in the *Cohen Grocery Company Case,* well said: "The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. . . . The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty."

In *Levy Leasing Company* v. *Siegel,* 258 U. S. 242, 250, a civil case arising out of the war-time rent law of the State of New York, this Court referred to the *Cohen Grocery Company Case* as "dealing with definitions of crime" and declared it "not applicable." This brief reference is now pressed on our attention, special emphasis being laid on the words "dealing with definitions of crime." We appreciate their import, but must recognize that they do not adequately reflect the matter dealt with. As already shown, it was broader than they indicate; and of course they were not intended to qualify or limit the decision. The important part of the reference was the declaration that the decision was not applicable to the case then under consideration. The inapplicability resulted from a material difference between the cases. One dealt with a federal statute prohibiting the sale of sugar at unjust, unreasonable and excessive prices, and the other with a state statute directed against reserving unjust, unreasonable and oppressive rent in the leasing of real property in a city for dwelling purposes.

The federal statute contained no provision pointing to what should be deemed a just, reasonable and not excessive price; and there was no accepted and fairly stable

commercial standard which could be regarded as impliedly taken up and adopted by the statute, as this Court construed it. While sugar has a market value, that value is subject to fluctuations which individual manufacturers and dealers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods. The tendency to vary is illustrated in the present record, which shows that the price advanced in the early part of 1920, reaching 26 cents a pound in June, then remained steady for a month or two, and then declined irregularly to about eight cents.

The New York statute was not silent as to what should be deemed a just, reasonable and unoppressive reservation of rent. It recognized and named elements which would require consideration, and the state court construed it as prescribing a standard " which permitted the landlord to receive a reasonable income on his investment," valued as of the time when the rent was reserved. *Levy Leasing Company* v. *Siegel,* 194 App. Div. 482, 506; s. c. 230 N. Y. 634. So, when the case came here the question presented in this connection was whether that standard was sufficiently definite to satisfy the requirement of due process of law in the Fourteenth Amendment. This Court held that it was. Real property, particularly in a city, comes to have a recognized value, which is relatively stable and easily ascertained. It also comes to have a recognized rental value—the measure of compensation commonly asked and paid for its occupancy and use—the amount being fixed with due regard to what is just and reasonable between landlord and tenant in view of the value of the property and the outlay which the owner must make for taxes and other current charges. These are matters which in the course of business come to be fairly well settled and understood. A standard thus developed and accepted in actual practice, when made the

test of compliance with legislative commands or prohibitions, usually meets the requirement of due process of law in point of being sufficiently definite and intelligible.

The difference which we have pointed out between the two statutes and between the matters sought to be regulated by them made it obvious that the decision on the validity of one statute had no bearing on the question of the validity of the other.

As section 4 was invalid, whether taken as a civil regulation or as a criminal statute, it follows that in so far as the special defenses were based on it the demurrers were rightly sustained.

Section 5 was not dependent on section 4; nor did this Court consider its validity along with that of section 4. For present purposes, it may be described as (a) providing for the licensing of transactions in necessaries, including the manufacture, refining, distribution and sale of sugar; (b) as declaring that the President, on finding that any licensee was taking an unreasonable profit, might, by an order reciting his finding, require such licensee to discontinue taking the unreasonable profit, and might also determine what was a reasonable profit to be taken in lieu of the one found unreasonable; and (c) as providing that " in any proceedings brought in any court such order of the President shall be prima facie evidence."

It is apparent that the section did not invest the President with general authority to fix the profit which might be taken on sales of sugar, but only with special authority, on finding that a licensee was taking an unreasonable profit, to require that such practice on the part of the licensee be discontinued and to determine what was a reasonable profit to be taken in place of the one condemned.

The special defenses, while showing that the plaintiff was licensed to manufacture, refine and sell sugar, contained no allegation that the President had found that the

plaintiff in selling its sugar was taking an unreasonable profit, nor any allegation of an order by the President requiring it to discontinue such a practice. Of course, the special defenses could not derive any support from that section when there had been no action by the President under it.

One of the special defenses speaks of the President's having fixed one cent per pound as the profit which might be taken. But the reference is to an administrative regulation[1] which had no application to sales by a manufacturer or refiner to a wholesale dealer, such as are in question here. Besides, that regulation was revoked May 31, 1919, before these contracts were made. There was an administrative regulation[2] applicable to manufacturers and refiners which restricted them to taking not more than a fair and reasonable advance over cost; but this regulation was revoked January 26, 1919, before the contracts were made.

The allegation that the contracts called for a delivery more than thirty days in the future, and therefore were unlawful as tending to increase the price and promote hoarding, was of no legal effect. While section 6 prohibited wilful hoarding, and also certain acts done for the purpose of unreasonably increasing or diminishing the price, it did not prohibit a selling for delivery more than thirty days in the future. Nor did the special defenses set forth any facts which could be regarded as bringing the contracts within any prohibition of that section. Not improbably the pleader had in mind an administrative regulation[3] applicable to manufacturers and refiners which forbade making contracts of sale under which

[1] Food Administration Special License Regulations, No. XI, A–5.

[2] U. S. Food Administration Special License Regulations, No. VI, B–2 and C–2.

[3] U. S. Food Administration Special License Regulations, No. VI, A–2.

shipment was not to be made within thirty days. But no support can be derived from that regulation, for it was revoked January 26, 1919, prior to the making of these contracts.

In so far therefore as the special defenses were based on sections 5 and 6 and the regulations cited the demurrers were rightly sustained—and this regardless of any question respecting the validity of either of those sections or of any of the regulations.

A short statement of the case shown by the evidence, in so far as it is embodied in the record, will give a better understanding of the remaining questions.

By the contracts, made in July, 1920, the plaintiff agreed to deliver the sugar to a carrier at New Orleans during September, or soon thereafter, for shipment to the defendant at Macon, Georgia; and the defendant agreed to accept delivery to the carrier, to pay the contract price, and to bear the carrier's charges. In August the market price of sugar took a downward turn and continued to decline to the end of that year. In September the plaintiff made the delivery to the carrier as agreed; and in due course the sugar reached Macon. The defendant then refused to accept it and wrote to the plaintiff saying, "For the good of whom it may concern we suggest that this carload of sugar be stored to save any additional cost (demurrage, etc.) against whoever might be affected." The storage was effected as suggested with a Macon warehouseman, but was intended to be only temporary. Much correspondence ensued—the defendant repeating its refusal to take the sugar, and the plaintiff insisting the defendant was bound to take it and to bear the carrier's charges, etc. Finally, on November 30, the plaintiff sent to the defendant a notice saying, "As you have continued to refuse to take this shipment we must now inform you that unless you accept and pay for same at once we will resell this sugar for your account. When resale is made

we will require you to remit the difference between contract price and price received on resale, as well as for all freight, storage and other charges incurred." The defendant made no answer. The plaintiff then paid the several charges, took possession of the sugar and resold it in and around Macon—the last portion being sold December 20. There was an oversupply of sugar in the hands of wholesale dealers and others in that vicinity at the time, which made it difficult to effect a resale. But the plaintiff made an active and honest effort to make a fair sale and succeeded in obtaining the full market price prevailing in larger markets, plus the freight to Macon. The total amount realized, less storage and other charges not questioned, was $2,963.04. With this sum credited on the contract price there remained a balance of $5,111.70, which was demanded in the first count of the plaintiff's petition.

On the trial the defendant sought to prove by jobbers and dealers in Macon that the price of sugar at Macon was higher in October and November than in December, and that in December particular sales were made at a higher rate than the plaintiff obtained on the resale—the purpose in offering this testimony being to discredit the fairness of the resale by the plaintiff. A preliminary examination of the witnesses disclosed that the market at Macon was greatly demoralized during that period; that jobbers and dealers were selling for what they could get regardless of cost, lest they might lose more through a further decline; that the buying was in relatively small quantities and was on what was termed a "hand to mouth" plane; and that the particular sales in December were of such a character that they would shed no light on the fairness of the resale. On the plaintiff's objection, the court refused to permit the proffered testimony to go to the jury. Complaint is made of this ruling. In our opinion it constitutes no ground for a reversal. There were

obvious infirmities in what was proposed to be shown about the market price in October and November; but we need not dwell on them, because, as will be explained later on, the state of the market in those months came to be quite immaterial. What was proposed to be shown about particular sales in December was rightly excluded. The sales were of a kind that did not tend to establish a standard by which to judge the plaintiff's resale. Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price. To have admitted the proffered testimony would have tended to confuse and mislead the jury.

At the trial the plaintiff took the position that when it delivered the sugar to the carrier at New Orleans its obligation under the contracts was fully performed and it became entitled to the contract price; that it could then have abandoned the sugar, but was not obliged to do so; that it had a vendor's lien thereon which could be availed of at any time before the sugar passed into the actual possession of the defendant; that it could realize on the lien by retaking the sugar and, after notice to the defendant, reselling the same for the latter's account and crediting the net proceeds on the contract price; and that it could recover the balance from the defendant. The District Court, in dealing with the first count of the petition, charged the jury to that effect—evidently believing it was conforming to Georgia statutes and decisions on the subject. No objection was made to that part of the charge nor was any exception taken to it; so we assume that it conformed to the local law and was applicable to the evidence. The court then proceeded to explain how that part of the charge should be applied, and in that connection said to the jury that if they believed from the evidence that the plaintiff retook possession under its vendor's lien,

they should next consider whether the resale was made within a reasonable time, and in doing so should take as the starting point November 30, when the plaintiff gave notice of its purpose to retake and resell, and should consider only the period between that date and December 20, when the resale was concluded. The defendant's counsel excepted to this, the terms of the exception being, "We except to the court fixing November 30 as the time from which a reasonable time should be figured. I construe the plaintiff as being always in possession." The defendant now insists the exception was well grounded. But we are of a different opinion. As the jury's verdict was for the plaintiff on the first count, they must have found that the plaintiff retook possession and made the resale under a vendor's lien. If it had such a lien under the law of Georgia—as we must assume in view of the unchallenged charge on that subject—the court plainly was right in saying the date when possession was taken under the lien was the starting point from which to reckon a reasonable time; and was also right in designating November 30 as that date. The suggestion in the exception that the plaintiff was "always in possession" had no support in the evidence set forth in the record, for it shows that the plaintiff surrendered possession to the carrier at New Orleans and was not again in possession until after the notice of November 30 was given declaring the plaintiff's purpose to take possession and sell. According to the Georgia statute, which the District Court applied, the plaintiff was entitled to take possession under its lien at any time before "actual receipt" of the sugar by the defendant. Parks Ann. Code, sec. 4132; *Branan* v. *Atlanta and West Point R. R. Co.*, 108 Ga. 70, 73. A duty to sell under the lien could not arise until possession was taken under it; and the reasonable time permitted for making a sale by way of realizing on the lien hardly would begin to run before.

What we have just said explains why the testimony offered respecting the state of the market at Macon in October and November, before the plaintiff took possession under the lien, became immaterial.

Judgment affirmed.

A. B. SMALL COMPANY *v.* LAMBORN & COMPANY.

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

No. 100. Argued October 21, 22, 1924.—Decided March 2, 1925.

1. Contracts for the sale of sugar considered and *held* free from the objection that they made delivery optional with the seller and therefore lacked mutuality. P. 250.
2. In an action by the seller on an intrastate contract for the sale and delivery of goods owned by the seller and title to which passed to the buyer unrestricted under the contract, the buyer can not defend upon the ground that the seller was party to a combination to manipulate interstate trade in goods of that kind in violation of the Anti-Trust Act and made the contract during the life of the combination and in conformity with standards sanctioned by it. It is only when the invalidity is inherent in the contract itself that the Act may be interposed as a defense to it. P. 251.
3. Defenses based on §§ 4, 5 and 6 of the Lever Act, *held* insufficient on grounds stated in *Small Co.* v. *Am. Sugar Co. ante,* 233. P. 252.
4. The duty of a seller of goods, in reselling on account of the buyer, is to sell fairly in a reasonably diligent effort to obtain a good price; the test is not whether he got the highest possible price or as much as others got in particular instances. P. 253.
5. Evidence of particular sales held rightly rejected in the circumstances. *Id.*
6. Where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict should be directed for the other party. P. 254.
7. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury, has met with express disapproval by this Court and by many others. *Id.*

8. Evidence *held* to establish conclusively that resales of goods, made by the vendor, were made fairly and within a reasonable time. P. 254.

Affirmed.

ERROR to a judgment of the District Court in favor of the plaintiff, Lamborn & Co., in an action brought to recover the difference between the contract price of sugar sold by plaintiff to defendant, and the amount obtained by the plaintiff on resale, the defendant having refused to accept delivery.

Mr. Edgar Watkins, with whom *Mr. Frederick T. Saussy, Mr. Mac Asbill* and *Mr. Horace Russell* were on the brief, for plaintiff in error.

Mr. Orville A. Park, with whom *Mr. Archibald B. Lovett* was on the brief, for defendant in error.

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

On April 30 and May 7, 1920, the parties to this case entered into contracts for the sale by one and purchase by the other of 450 barrels of refined sugar, to be shipped by the seller from a refinery at Port Wentworth, Georgia, to the buyer at Macon, in the same State, between July 15 and October 1. Late in July, 150 barrels were shipped, accepted and paid for. About that time the market price began to decline and continued downward for the rest of the year. Late in August the seller shipped 150 barrels more, but when it reached Macon the buyer refused to accept it, suggested that it be stored "for the benefit of whom it may concern," which was done, and notified the seller that any further shipment would be similarly refused. Correspondence followed in which the seller sought to persuade the buyer to adhere to the contracts. Late in September, before the expiration of the time for completing delivery, the seller notified the buyer that, if

the refusal to conform to the contracts was continued, the remaining 300 barrels, which included the 150 stored at Macon, would be resold for the account of the buyer and the latter would be held for the difference between the contract price and what was realized on the resale. The buyer persisted in the refusal and the sugar was resold.

This action was brought by the seller to recover from the buyer the difference between the contract price and the amount obtained on the resale. In the District Court a verdict and judgment were given to the seller; and the buyer brought the case here on direct writ of error, a constitutional question being involved.

One defense interposed by the answer was that the contracts were wanting in mutuality and therefore void. A demurrer to the defense was sustained, and this is assigned as error. Two clauses in the contracts are cited as making delivery optional with the seller, and therefore showing a want of mutuality. But in our opinion the clauses are not open to that construction. The contracts, signed by both parties, evidenced an agreement by the seller to deliver the sugar within a designated period at a fixed price, as well as an agreement by the buyer to take the sugar and to pay the price. They contemplated that the buyer might be accorded the privilege of calling for special deliveries, known as "withdrawals," during the prescribed period, if the seller was in a position reasonably to make them. And they contained alternative "terms" of payment—"Cash before delivery less 2%, or cash in seven days less 2%." The clauses in question then followed. One was, "Terms and withdrawal subject to the approval of the seller's credit department." Read in the light of established practices in the sugar trade, this clause meant that, when a shipment was made, the seller's credit department was to elect which of the alternative terms of payment should apply, and also that, if the buyer called for special deliveries, known as "with-

drawals," that department was to determine whether such deliveries reasonably could be made and was to approve or disapprove them accordingly. The clause was essentially subsidiary and entirely consistent with the seller's definite agreement to make delivery within the period prescribed. The other clause was to the effect that, " if the supply of raw material of the refinery manufacturing the sugar " should be interrupted by war conditions, embargoes, strikes, or other like cause, and if delivery was thereby prevented, the seller should " not be responsible." There is nothing in this clause which affords any basis for saying that delivery was to be optional with the seller. On the contrary, it recognizes that he was obligating himself to make delivery. Its evident and only purpose was to relieve him from liability in the event that performance of the obligation was prevented by particular circumstances, in their nature beyond his control. It is idle to suggest, as was done in argument, that the clause would permit him to avoid delivery by merely selecting a refinery which by reason of war conditions, embargoes or strikes was already cut off from a supply of raw material. That would not be within either the letter or the spirit of the clause, but would be a palpable fraud and unavailing. *Slater* v. *Savannah Sugar Refining Corporation,* 28 Ga. App. 280, 284.

The answer set up a special defense based on the Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, prohibiting restraints and monopolies in interstate and foreign commerce. A demurrer to the defense was sustained and the ruling is assigned as error. But it was plainly right. In the first place, the contracts pertained only to intrastate commerce. They were negotiated in Georgia; the sugar was to be delivered from a refinery at Port Wentworth and shipped to Macon, both in Georgia; and no facts were alleged showing that interstate or foreign commerce was

affected. In the next place, and independently of the character of commerce involved, it was not shown that the contracts were in themselves invalid under the Anti-Trust Act, but only that they were collateral to a combination prohibited by it. In substance, the defense was that the seller and others had entered into a combination to manipulate interstate trade in refined sugar with a view to increasing the price; that the contracts were made during the life of the combination; and that the seller conformed the terms of sale to standards sanctioned by the combination. There was no allegation that it was not the owner of the sugar; nor any allegation that the buyer was a party to the combination or other than a stranger to it. The contracts disclosed the full transaction between the seller and buyer and contemplated that the sale should pass the title without any restriction on the right of the buyer to resell as it might choose. As has been pointed out in prior cases, there is nothing in the Anti-Trust Act which invalidates such a collateral contract or relieves the buyer from his obligation under it. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 550–552; *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, 257–259; *Wilder Manufacturing Co.* v. *Corn Products Co.*, 236 U. S. 165, 177. It is only where the invalidity is inherent in the contract that the Act may be interposed as a defense. With that exception the remedies which the Act provides for violations of it are exclusive. *Wilder Manufacturing Co.* v. *Corn Products Co., supra*, 172, 175; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 471; *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 593.

The answer also interposed a number of special defenses based on sections 4, 5 and 6 of the Lever Act, c. 53, 40 Stat. 276; c. 80, 41 Stat. 297, and on particular orders and regulations issued under it. These defenses were held insufficient on demurrer—some on the ground that a part of the Lever Act was in conflict with the due

process of law clause of the Fifth Amendment. Some of the defenses were like those considered and rejected in *Small Co.* v. *American Sugar Refining Company,* just decided, *ante,* p. 233; and what was said of them there suffices to dispose of them here. The want of merit in the others is so obvious that they do not call for special notice. While the ruling on them is assigned as error, no attempt to support them is made in the brief.

The sugar which was resold by the seller for the account of the buyer consisted of 105,000 pounds—the 52,500 pounds stored at Macon and a like quantity remaining at the refinery. The market at that time was unsettled. Wholesale dealers had an oversupply, and retail dealers were buying cautiously and in small quantities. Nevertheless the prices realized on the resales equaled the full market price for that general region for quantities such as were resold. The 52,500 pounds stored at Macon was resold October 11th and that at the refinery November 3d. In both instances the defendant was advised of the price offered by the intending purchaser and was given an opportunity to secure a purchaser at a better price, but none was brought in. A resale of the 52,500 pounds at the refinery was negotiated October 15th, but through some delay in transportation it was not consummated. Another sale was then negotiated and was completed November 3d at a little higher price.

The defendant offered to prove by wholesale dealers in Macon the prices received by them on particular sales to retail dealers about the time of the resales; but the testimony was rejected, and we are asked to say that this was error. We think the ruling was right. The particular sales were in relatively small quantities, many of them under 300 pounds, and had no probative bearing on the fairness of the resales. The real question, as stated in *Small Co.* v. *American Sugar Refining Company, supra,* was whether the resales were fairly made in a reasonably

diligent effort to obtain a good price, and not whether the plaintiff got the best possible price, or as much as others got in particular instances. The unsettled state of the market and the difference between selling small quantities to retail dealers to satisfy immediate needs and selling large quantities to wholesale dealers who had an oversupply made is necessary to confine the evidence to the real question.

On the conclusion of the evidence the court directed a verdict for the plaintiff; and the remaining question is whether this was error. The defendant insists that it was, because it took from the jury the question whether the resales were made within a reasonable time. The period for delivery under the contracts expired September 30th, and the court ruled that the duty to resell within a reasonable time arose at that time, which was practically conceded. One of the resales was made October 11th. Another was negotiated October 15th but fell through, and an effective one was made November 3d.

The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. *Improvement Company* v. *Munson,* 14 Wall. 442, 448; *Pleasants* v. *Fant,* 22 Wall. 116 122; *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Anderson County Commissioners* v. *Beal,* 113 U. S. 227, 241; *Delaware, etc. R. R. Co.* v. *Converse,* 139 U. S. 469, 472.

We are of opinion that the evidence as set forth in the record conclusively established that the resales were

made within a reasonable time. The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the need for care. The witnesses for the plaintiff described with much detail the efforts which were made, and the evidence as a whole reasonably admitted of no other conclusion than that the efforts were timely, well directed and persistent. Many bids were received, but almost all were so low that their acceptance would have meant a great sacrifice. The defendant was notified of the purpose to resell, but made no effort to advance it in point of time or to bring in a purchaser at an acceptable price. Considering the state of the market, the outcome appears to have justified both the time and care taken by the plaintiff.

Judgment affirmed.

BROWNE *v.* UNION PACIFIC RAILROAD COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 194. Argued January 19, 1925.—Decided March 2, 1925.

A purchaser of interstate shipments of grain sued the carrier for damages alleged to have resulted from the falsity of dates of original shipment as recited in substituted order bills of lading issued by the carrier's agent, and the state court sustained the carrier's defenses, partly upon the ground that such bills of lading were not strictly negotiable under the Federal Bill of Lading Act, as contended by the plaintiff, and partly upon other and non-federal grounds. *Held* that, as the latter grounds were substantial and broad enough to sustain the judgment, the judgment should be affirmed without considering the federal question.

113 Kans. 726, affirmed.

CERTIORARI to a judgment of the Supreme Court of Kansas which sustained a judgment for the Railroad Company in an action by Browne for damages alleged

to have resulted from false recitals of dates in substituted bills of lading. See 113 Kansas, 726.

Mr. Ray Campbell, with whom *Mr. J. Graham Campbell* was on the briefs, for petitioner.

Mr. Nelson H. Loomis, with whom *Mr. T. M. Lillard* and *Mr. C. B. Matthai* were on the brief, for respondent.

Mr. Luther M. Walter, by leave of Court, filed a brief as *amicus curiae.*

Mr. Justice McReynolds delivered the opinion of the Court.

This action was begun in the District Court, Shawnee County, Kansas, to recover damages resulting from false recitals of dates contained in substituted order bills of lading for four cars of wheat. These bills were issued by respondent's agent at Denver and stated, contrary to the facts, that they were given in lieu of others issued at points of origin on specified dates *prior to November 9, 1920.*

Petitioner agreed to buy a quantity of wheat from the Ed Past Grain Company, of Denver, at a stipulated price, shipments to be made before November ninth, and then contracted to resell at a favorable price contingent upon like shipments. He alleged that, relying on the false recitals in the substituted bills, he paid drafts drawn on himself by the Past Company for the purchase price, but was unable to use the wheat, when received, to fulfill his contract of resale because original shipments were too late, and that he was compelled to dispose of it on a declining market at considerable loss. Also, "That according to the usage and custom of the grain business, well known to defendant . . . time of shipment of grain in car lots is determined by the date appearing on the bills of lading on which the carrier received such car of grain for transportation and grain on contract is delivered by tendering

a properly endorsed order bill of lading attached to the seller's draft on the buyer for the estimated price of such car of grain, such order bill of lading being delivered to the buyer upon payment of such draft."

Answering, respondent denied every allegation of the petition not specifically admitted. It acknowledged purchase of the wheat by petitioner from the Past Company, but alleged that, having failed to cancel the contract because of delay, as permitted, he was bound to accept the wheat on arrival; also, that it had no notice of the contract for resale and was not liable for any special damages consequent upon failure to comply therewith. It further stated that the substituted bills were prepared by the Past Company and the signature of its Denver agent obtained by fraud; that the agent had no authority to sign bills containing false or erroneous statements; that petitioner could have disposed of the wheat without loss if he had acted promptly and prudently upon receipt of the same. And (Paragraph 5), "Defendant denies specifically that plaintiff used every effort to ascertain the dates said shipments were made, and this defendant alleges that the freight bills which plaintiff alleges were paid by him, show fully the points where different parts of said shipments originated in less than carload lots, and show the transit point where the same were consolidated into the four carload shipments involved in this action; that had plaintiff awaited the arrival of said shipments at McKinney, Texas, before paying the drafts attached to the bills of lading he could, by inquiring of the delivering carrier, have ascertained all of the facts relative to the dates and points of origin of said shipments, and defendant alleges this information was equally available to him at any time thereafter. Defendant further alleges that by reason of the lateness of the delivery of said shipments, plaintiff was, or should have been warned, of the probability of the fraud of the Ed Past Grain Company, and should have

detected the same prior to the payment of the drafts and acceptance of the wheat, as did The Gladney Milling Company when the wheat was thereafter tendered to them for application on the contract between them and the plaintiff."

A general demurrer to the answer and special demurrers to certain paragraphs were interposed and overruled by the court. Judgment went against petitioner. He stood on the demurrer and perfected an appeal to the Supreme Court, which affirmed the challenged judgment. In the latter court his principal contention seems to have been that the Federal Bill of Lading Act, approved August 29, 1916, c. 415, 39 Stat. 538, makes order bills of lading strictly negotiable and therefore respondent became liable to him for the damages consequent upon misstatements of dates in the substituted bills. This contention was duly considered and rejected. The court then said—

" It follows that insofar as plaintiff's demurrer involved the question chiefly urged here, the ruling of the trial court was correct. The other matters pleaded in defendant's answer, to which the plaintiff objected and demurred, need but brief attention. The fact, if correct, that plaintiff was bound to accept the shipments from the Ed Past Grain Company, may not be a complete defense to plaintiff's cause of action, but it does raise an issue which may become important on the measure of damages if any are recoverable in the action. And whether there was a custom of grain dealers to rely on the datings of bills of lading, of which the carrier had notice or was bound to take notice, was also a question of fact, and therefore not demurrable. The scope of the powers of defendant's agent at Denver could not be determined by demurrer; and neither could the matters pleaded in the fifth paragraph of the answer summarized above."

" It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment,

and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." *Hammond* v. *Johnston,* 142 U. S. 73, 78; *Enterprise Irrigation District* v. *Canal Company,* 243 U. S. 157, 164.

It seems clear that the Supreme Court of Kansas rested its judgment, affirming the action of the trial court, upon a non-federal ground broad enough to sustain it. The answer not only relied upon non-negotiable features of the bills—the federal question—but advanced other defenses good as against the general demurrer. It denied the existence of any trade usage to accept as accurate recitals as to dates in bills of lading, also that the Denver agent had power to issue the substituted bills. It asserted that petitioner was obligated to accept the grain irrespective of the dates of original shipments, and that if due diligence had been exercised no loss would have occurred. These denials and assertions raised questions under the state laws. They were substantial and broad enough to sustain the ruling of the trial court.

The judgment below is affirmed.

Affirmed.

AUSTIN NICHOLS & COMPANY *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

SANCHEZ ET AL., COPARTNERS, TRADING AS E. SANCHEZ & COMPANY, *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

E. TOLIBIA & COMPANY *v.* STEAMSHIP "ISLA DE PANAY," HER ENGINES, ETC., ET AL.

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

Nos. 199, 200, 201. Argued January 19, 1925.—Decided March 2, 1925.

In proceedings *in rem* brought by consignees against a vessel to recover for damage to shipments of olives consigned in casks from Seville to New York, it appeared: that the damage was due to the weakness of the casks in which they were shipped and not to the ship's negligence; that this weakness was known to the ship's agent, before he accepted the shipment from the consignors at Seville and issued bills of lading, and to her captain when the casks were transferred from another vessel to the libeled ship at Cadiz; that the agent had accepted the shipment and issued the bills of lading "clean," without noting thereon the state of the casks, upon condition that the consignors give the shipowner a letter of guarantee relieving it from responsibility therefor, which was done; that the bills of lading expressly exempted the ship from responsibility for damage resulting from fragile containers; that the consignees had directed their Seville bankers to pay the agreed purchase price for the olives upon presentation of clean bills of lading, and that the consignors thus obtained payment upon the bills in question, though there was nothing to show that the ship or its owner knew of this arragement between buyer and seller or that the bank, in accepting the bills, lacked information of the circumstances attending their issue. The petition did not allege fraud or any peculiar trade usage at Seville—*Held:*

(*a*) That the evidence was insufficient to establish fraud. P. 272.

(*b*) That the evidence, including testimony by the ship's captain, was insufficient to establish a trade usage that bills of lading without notations impliedly acknowledged receipt of merchandise in apparent good order and condition. P. 272.

(*c*) According to the long established rule, bills of lading, like those in question, do not affirmatively represent good order and condition; and the Harter Act, (c. 105, 27 Stat. 445,) does not require that they be given a different effect, either by construction or by estoppel. P. 273.

292 Fed. 723, affirmed.

CERTIORARI to decrees of the Circuit Court of Appeals affirming decrees of the District Court, which dismissed three libels *in rem* for damages to goods.

Mr. T. Catesby Jones, with whom *Mr. James W. Ryan* was on the briefs, for petitioners.

The decision of the lower courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it resulting in prejudice to the person from whom the information has been withheld. *Morgan* v. *Railroad Company,* 96 U. S. 716; *Leather Manufacturers' Bank* v. *Morgan,* 117 U. S. 96; *Dickerson* v. *Colgrove,* 100 U. S. 578; *United States Bank* v. *Lee,* 13 Pet. 107; *Stewart* v. *Wyoming Ranch Co.,* 128 U. S. 383; *Turner* v. *Green* (1895) 2 Ch. 205.

In the present case there was not merely negligence or silence of the *Isla de Panay's* agent, but deliberate and intentional concealment. Her agent did not merely stand by when the bills of lading were issued, but conspired with the shippers to defraud purchasers of the goods shipped. He declined to issue clean bills of lading until the shippers would indemnify him against what he knew would be a result of his fraudulent act.

The decisions of the courts below are contrary to the decisions of Circuit Courts of Appeals of other circuits. *H. Scherer & Co.* v. *Everest,* 168 Fed. 822; *The Tampico,* 270 Fed. 537.

The elements of an estoppel *in pais* are stated by Pitney J., in *Central Railroad Co.* v. *MacCartney,* 68 N. J. L. 165. See *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386; *Martineaus* v. *Royal Mail Steam Packet Co.,* 12 Asp. M. C. 190; *Bradstreet* v. *Heran,* 3 Fed. Cas. 1183; *Crawford & Law* v. *Allan Line S. S. Co.,* (1912), A. C. 130; *National Bank* v. *Kershaw Oil Mill,* 202 Fed. 90; *Nelson* v. *Woodruff,* 1 Black 156.

If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should, nevertheless, be held liable under the rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong. *Peoples Bank* v. *National Bank,* 101 U. S. 181; *Butler* v. *United States,* 21 Wall. 272; *Pompton* v. *Cooper Union,* 101 U. S. 196; *Hern* v. *Nichols,* 1 Salkeld 289; *Briggs* v. *Jones,* 10 Eq. 92; *Smith* v. *Armour Packing Co.,* 158 Fed. 86; *H. Scherer & Co.* v. *Everest,* 168 Fed. 822.

The carrier was under a duty to disclose to the consignee the fact that the casks were apparently in bad external condition and unfit for carriage. *Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67; *Hinrichs* v. *Bank,* 279 Fed. 382.

The *Isla de Panay,* being a general cargo ship, had the same right as any other common carrier to refuse to accept goods packed in defective containers. *Hannibal R. R. Co.* v. *Swift,* 12 Wall. 262; *The David & Caroline,* 5 Blatch. 266.

An implication arises that the goods covered by the bill of lading are normally fit to withstand ordinary handling during the carriage and discharge, unless the shipmaster makes notations to the contrary. This implication also arises as a corollary of the principle recognized as to all

kinds of contracts, that it is the duty of a contracting party who has exclusive knowledge of material facts to disclose those facts to the other party. *Strong* v. *Repide,* 213 U. S. 419; *Molyneux* v. *Hawtrey,* L. R. (1903) 2 K. B. 487; *Carlish* v. *Salt,* L. R. (1906) 1 Ch. 335; *Phillips* v. *Homfray,* L. R. 6 Ch. 770; Williston on Sales (2nd Ed.) §§ 234 and 265; *Cesar* v. *Karutz,* 60 N. Y. 229; *Harp* v. *Choctaw O. & G. R. Co.,* 125 Fed. 445.

The liability of a common carrier of goods does not primarily, at least, rest on the contract to carry, but is implied by law, having its foundation in the policy of the law, and it is by reason of this legal obligation that a carrier is charged with the loss of, or injury to, property intrusted to it for carriage. *Railroad Co.* v. *Swift,* 12 Wall. 262; *The Georg Dumois,* 88 Fed. 537; *Klauber* v. *American Express Co.,* 21 Wis. 21; *Atlantic Coast Line R. Co.* v. *Rice,* 169 Ala. 265; *The Delaware,* 14 Wall. 579.

A duty to disclose also arose from the trade usage which was testified to by the respondent's witnesses. This usage required that if casks were offered for shipment in apparent bad external condition, the bills of lading should contain notations showing that fact.

A duty to disclose also arose from the issuance by the *Isla de Panay* of commercial documents intended for sale to innocent buyers. Admiralty courts have always held the issuers of bills of lading to a high standard of fairness. This tends to encourage commerce. If there is no duty of the issuer of a bill of lading intended for sale to an innocent consignee to disclose, at least in a general way, facts obviously impairing the value of the bill of lading, ships' agents will be encouraged to issue confused and ambiguous bills of lading and to tamper with the centuries-old recitals which have made bills of lading a trustworthy and marketable symbol of the goods described and thus permitted the expansion and development of international commerce. *Pollard* v. *Reardon,* 65 Fed. 848; *Watts* v. *Cargo of Lumber,* 161 Fed. 104.

A duty to disclose also arose from § 4 of the Harter Act of February 13th, 1893. *Knott* v. *Botany Mills,* 179 U. S. 69; *The Delaware,* 161 U. S. 459; *Hansen* v. *American Trading Co.,* 208 Fed. 884.

The court below incorrectly decided as matter of law that "the burden of proof rested upon the libelants to establish negligence on the part of the claimant, and this burden we have no hesitation in saying was not sustained." *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386; s. c. 242 Fed. 568; *Bank of Batavia* v. *New York etc., R. Co.,* 106 N. Y. 200.

Mr. John W. Crandall for respondent.

The Circuit Court of Appeals correctly held that the petitioners were not entitled to a recovery against the steamship *Isla de Panay,* because the damage to the merchandise came within the exemptions of the bills of lading issued for the goods and the petitioners totally failed to prove negligence on the part of the ship or the claimant-respondent.

The cargo owners assume the burden of proving negligence when the damage falls within a valid bill of lading exemption. *Clark* v. *Barnwell,* 12 How. 272; *The Henry B. Hyde,* 90 Fed. 114; *The Patria,* 132 Fed. 971; *The Lennox,* 90 Fed. 308; *The J. L. Luckenbach,* 209 Fed. 142; *The Arpillao,* 270 Fed. 426.

The petitioners' casks were of insufficient strength for the carriage of olives. The *Isla de Panay* is therefore exempt from liability both under the Harter Act and the exceptions of the bills of lading.

The case of *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386, which has been practically the sole reliance of the petitioners, is unsound. *Williams* v. *Providence Washington Ins. Co.,* 56 Fed. 159; *The Plymouth,* 3 Wall. 20; *Pollard* v. *Vinton,* 105 U. S. 7; *Atchison, Etc., Ry. Co.* v. *Harold,* 241 U. S. 371; *St. Louis, Etc., Ry. Co.* v. *Knight,* 122 U. S. 79.

Neither the *Isla de Panay* nor her owner is estopped from showing the insufficiency of the petitioners' casks. *The Eli Whitney* (1848), Fed. Cas. 4345.

A carrier issuing a bill of lading which is silent as to the condition of the goods, is not thereby penalized by being deprived of the defenses ordinarily available under the Harter Act. *The Isola di Procida,* 124 Fed. 942.

Mr. Justice McReynolds delivered the opinion of the Court.

These are proceedings *in rem* against the Isla de Panay to recover for damage to merchandise brought by her from Cadiz, Spain. They present the same issues and were heard on the same proof. It will suffice to refer to the facts disclosed in number 199.

December 21, 1917, in the United States District Court, Southern District of New York, Austin Nichols & Company, a corporation, filed a libel and complaint against the respondent steamship.

It alleged: Ownership of the damaged merchandise. Presence of the vessel within the court's jurisdiction. That "On October 27, 1917, Rowlett y Pyman shipped and placed on board the steamship Isla de Panay, then lying at the port of Cadiz, Spain, two hundred and twenty-seven (227) packages of olives in good order and condition, to be carried by the said steamship Isla de Panay as a common carrier from the port of Cadiz to the port of New York and there to be delivered in like good order and condition as when shipped to your libellant, in accordance with the terms of bills of lading then and there issued for the said shipment and in consideration of an agreed freight. Thereafter the said steamship Isla de Panay sailed from the port of Cadiz and arrived at the port of New York in the month of November, 1917, and there discharged her cargo, not in like good order and condition as when shipped, but badly damaged."

Consequent damages amounting to about eleven thousand dollars.

It prayed: For process according to the course and practice in causes of admiralty and maritime jurisdiction to issue against the steamship, her engines, boilers, etc. That a decree be granted for the damage sustained and the steamer condemned and sold to satisfy the same.

The Compañia Trasatlantica claimed the vessel as sole owner, obtained her release and answered, denying liability. It admitted receipt of the goods and alleged their carriage and delivery as required by the bills of lading. It specifically admitted and alleged: "That on or about the 6th day of November, 1917, there were shipped on board the steamship Isla de Panay, then at the port of Cadiz, Spain, and bound for the port of New York, 227 casks said to contain olives, the weight and contents of said casks and their quality, however, being stated to be unknown to the claimant, which expressly declined to be responsible therefor. . . . That it was agreed that the merchandise should be transported for a stipulated freight to the port of New York and there be delivered to the order of the libellant, subject to the conditions and exceptions from liability contained in the bills of lading issued for said merchandise at Seville, Spain, from which port said merchandise was shipped in the first instance. . . . That thereafter the steamship Isla de Panay sailed from the port of Cadiz, Spain, and arrived in due course at the port of New York in the month of November, 1917, and that it thereafter delivered at the port of New York all of the above mentioned merchandise which it received on board the ship at Cadiz in pursuance of and in compliance with the terms and conditions of the bills of lading hereinabove referred to." That the bills of lading expressly exempted the vessel from responsibility for damage resulting from breakage of the articles and fragile containers; the ship was in all respects seaworthy,

properly manned, equipped and supplied for the voyage; if the merchandise suffered loss or damage the ship was relieved from liability by the bills of lading, particularly that clause concerning breakage and fragile containers, also by the Harter Act, approved February 13, 1893, c. 105, 27 Stat. 445, 446.

Upon the indicated issues evidence was taken and the cause went to hearing.

The agent of the owner of the Isla de Panay stationed at Seville, Spain, there accepted the casks of olives (each of them weighed 1500 pounds or more) and delivered to the consignors bills of lading. These recited: "M. Rowlett and Pyman has shipped on board the Spanish steamer Isla de Panay, its captain M—, with destination to New York and consigned to Austin Nichols, the effects declared on back on the following conditions. . . . ignoring weight and contents." They said nothing concerning order or condition of the merchandise and contained exemption clauses as stated in the answer.

The casks were carried down the River Guadalquivir seventy-five miles to Cadiz, on a small steamer belonging to the owner of the Isla de Panay, and were there delivered to her. They were loaded, stored, transported and landed at New York without negligence or default by the vessel; but the casks broke and the olives were damaged. That the casks were old, weak and quite liable to break was observed by the owner's agent at Seville, and because of this he declined to accept them until the shippers gave the following agreement to secure against loss—

"Sevilla, November 5, 1917.

Compañia Trasatlantica, Sevilla.

My dear Sirs: With reference to the shipment of 227 casks of olives that we are making by the steamer Isla de Panay to New York, we understand that that company considers the containers insufficient and that it does not

accept responsibility for the damages that they suffer as natural consequences of the voyage. And as guarantee of that company we sign the present, as you have delivered us clean bills of lading. Yours very truly, Rowlett & Pyman."

The captain of the Isla de Panay did not see the bills, nor did he know of the letter of guaranty until after the voyage had been completed. He observed the bad condition of the casks before accepting them at Cadiz, and their imperfection was noted on the accompanying shipping orders.

It appears that Austin Nichols & Company had directed their bankers at Seville to pay the agreed purchase price for the olives upon presentation of clean bills of lading. The bankers accepted the bills presently under consideration and paid the stipulated price to the consignors. There is nothing to show that the ship or her owner knew of the particular arrangement between buyer and seller.

Libellants now insist that a trade usage prevailed at Seville under which bills without notation were regarded as receipts for merchandise in apparent good order and condition, and to establish this usage they rely upon an answer in the testimony of the vessel's captain. When asked by respondents' counsel, "Why are these letters of guarantee given in Seville?" he replied—

"If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it they will pass it to a banking house and the insurance company that they have been shipped by the shipper in apparent good order and condition, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages."

Eduardo Benjumea, the owner's agent at Seville who issued the bills, testified—

" In view of the above and as was usually done in such cases, according to custom and at the request of the shippers in order that their goods might not be prejudiced more than was necessary, and at the same time to relieve the company which I represent from responsibility, I ordered the acceptance of the letters of guarantee . . . The custom of demanding letters of guarantee by steamship companies from shippers to protect themselves from possible claims for the arrival in bad condition of the shippers' goods at the port of destination, is old and well established and based on the following: (1) The decided opposition on the part of the shippers to notations being placed on the bills of lading which unnecessarily prejudices their goods and leaves everything to the good faith of the receivers. (2) Due to the general character that would necessarily have had to be given to the notations on the bills of lading and it being practically impossible to examine carefully all the casks one by one both on account of economy and fixed dates on which the mail boats of the Compania Trasatlantica had to depart from Cadiz for the States; we could make, with such notations, greater damage than would be justifiable, which considering the honorable practices of the Compania Trasatlantica, we naturally tried to avoid. (3) Although letters of guarantee were always requested for the above stated reasons, an exceptional use of these letters was made during the European war, as a consequence of the general bad quality of the packing which, during that time, was presented for shipment. This bad quality of the packing was due to the lack of containers in good condition and an enormous demand for containers of this class which it was impossible to meet. What took place was the use of all available containers notwithstanding their sometimes inferior quality; that is, chestnut wood was accepted in place of oak in spite of the fact that old oak containers are stronger than new ones of chestnut. I

have been sixteen years in the shipping business as shipping agent, and have had a great experience in matters thereto pertaining, derived from the years so spent."

The District Court dismissed the libel. It said—

"The great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimant's vessel at Cadiz . . . The libelants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libelants to their injury and is now estopped under the doctrine of *Higgins* v. *Anglo-Algerian Steamship Co.*, 248 Fed. 386, to claim that the containers were insufficient. In that case, however, there was in the bill of lading an express representation that the merchandise itself was in apparent good order and condition, when it was known to be injured by rain water. Here the parties believed doubtless that the olives would go through, but the ship's agents were not willing to take the risk of any liability which might arise from old casks. No case has gone so far as to hold that a bill of lading containing no words representing the condition of the containers would give rise to an estoppel. The Harter Act expressly provides that the vessel shall not be liable for any 'insufficiency of package.'"

The Circuit Court of Appeals affirmed the decree of dismissal. Having pointed out that the proceedings were *in rem* against the vessel and not *in personam* against the owner; that the libel alleged the merchandise was placed on board "in good order and condition," and was not discharged "in like good order and condition"; that the bills were not signed by the captain; that the containers were weak when received, etc.; that court expressed inability

to discover any ground upon which the libel could be sustained. It found—

"In the instant cases the damage to the merchandise came within the exceptions of the bill of lading which declared that the shipowners were not responsible for breakage. That many of the casks were broken is undisputed. The burden of proof rested upon the libelants to establish negligence on the part of the claimant and this burden we have no hesitation in saying was not sustained. On the contrary it has been established by the overwhelming weight of evidence that whatever damage the merchandise suffered in the cases now before the court was due not to the negligence of the ship but to the old and insufficient containers in which the goods were shipped."

And it held that the ship was not estopped to set up the bad condition of the casks by anything done at Seville or under the Harter Act; and that *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386, was not controlling.

Counsel for petitioners maintain: That with corrupt purpose and as part of a scheme to defraud petitioners, the ship issued bills of lading designed to conceal the bad condition of the casks, knowing that the shippers intended to obtain money upon them according to the local usage. That under the Seville usage bills of lading without notations impliedly acknowledged receipt of the merchandise in apparent good order and condition, and the ship could not repudiate this representation. That, considering this local trade usage, it was the positive duty of the ship to disclose the bad condition of the casks. Failure therein made the fraud upon petitioners possible, and "Where one of two innocent parties must suffer he must bear the loss whose act put it into the power of the third party to commit the wrong." That Section 4 of the Harter Act imposed the positive duty to disclose the containers' bad condition. And, finally, that the doctrine approved in *Higgins* v. *Anglo-Algerian S. S. Co.*, is applicable and controlling.

Evidently the libels were drafted with the expectation of showing that the merchandise suffered damage from bad handling. Petitioners' witnesses testified that the casks reached New York in good condition but were negligently unloaded. The manager for Austin Nichols & Company said: "The casks were satisfactory containers." "I do not claim that the casks were bad." "Our claim is that these casks were handled in a bad way, by bad methods." "I do not make any claim about the casks, but we are making a claim about the manner in which they were handled."

The courts below, correctly we think, have found that the overwhelming weight of evidence shows the casks were in bad condition when received at Cadiz but were loaded, carried and discharged without negligence or fault.

Petitioners did not allege fraud or any peculiar trade usage at Seville, and there is no sufficient evidence to establish either of these things. The mere statement by the ship's captain referred to above is not enough to show a peculiar trade usage at Seville, there commonly known and acted upon; and it does not apear that the bank which accepted the bills of lading lacked full information concerning the circumstances attending their issue. The argument of counsel proceeds mostly upon assumption not supported by the record. *Bowling* v. *Harrison,* 6 How. 248, 259; *Adams* v. *Otterback,* 15 How. 539, 545, 546; *Oelricks* v. *Ford,* 23 How. 49, 61, 62. And see Carver on Carriage of Goods by Sea, 6th Ed., Sec. 181 *et seq.*

The Harter Act provides—

"Sec. 4. It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether

260 SUTHERLAND, J., TAFT, C. J., and VAN DEVANTER, J., dissenting.

it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

" Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. . . ."

In the present case the bills of lading were issued as agreed by the parties—no demand was made for bills with different recitals. According to the long established rule, bills like those before us do not affirmatively represent good order and condition (*Atchison, Topeka & S. F. Ry.* v. *Harold,* 241 U. S. 371), and we find nothing in the Harter Act which requires that they be given a different effect, either through construction or by estoppel.

Higgins v. *Anglo-Algerian S. S. Co., supra,* is essentially different from the present cause. There the bill of lading expressly recited that the merchandise had been received in good order and condition; and the ship was seeking to escape liability by setting up its own wrongful action.

The decrees below must be

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

I am unable to agree with the opinion just delivered. It seems to be conceded, but in any event I think it must be conceded, that if the bills of lading had contained a recital that the merchandise was received in good condition the ship would have been estopped from asserting that in fact it was in bad condition. *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386. Here, I think, the circumstances are such as to make the omission of a recital

upon the subject the equivalent of a statement of good condition.

The shipment was accepted and the bills of lading issued by the ship's agent [1] who testified that he was aware of the bad condition of the merchandise and that the letters of guarantee were taken with the understanding that no notation to that effect would be made on the bills. They were what are known as "clean bills," which meant, in this case at least, according to the evidence, bills which "a banker will accept and attach to a draft and on which he will make payment against a letter of credit, and which *indicates that the merchandise was in good condition when it was received from* [*by*] *the steamship company.*" Without going into detail, I think it is fairly to be deduced from the evidence that the usages of the trade required a notation, and the evidence is clear that a notation of bad condition would have been made except for the letters of guarantee. The master of the Panay testified: "If a letter of guarantee is given me relieving me or the ship of all responsibility, as was done

[1] Section 4 of the Harter Act makes it the duty of the owner, master or *agent* of the *vessel* to issue a bill of lading. The bills of lading recite that the merchandise in question has been shipped on "the Spanish steamer Isla de Panay" and purport to be issued by the "Agent of the Steamer." The agent at Seville who issued the bills, in one place calls himself an agent of the company and in another place speaks of "this agency for the S. S. Isla de Panay." The fact is that the question of agency was not seriously in issue in the trial court, and the statements in the evidence relating thereto were more or less casual, but enough appears to make it clear to my mind that the relation of agent to the ship was fairly established. A point is made of the fact that the bills of lading were delivered at Seville while the merchandise was delivered to the Panay at Cadiz. But delivery of the merchandise at Seville to the small steamer belonging to the same owner, for the sole purpose of transshipment, was in effect a delivery to the Panay. *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How. 386; *The City of Alexandria*, 28 Fed. 202, 205–206.

in this case, no notation will be put on the bill of lading, but if there is no letter of guarantee given, then a notation will be put on the bill of lading."

Consignees had instructed their bankers in Spain to pay the purchase price of the goods only upon presentation of clean bills of lading, and there is evidence to the effect that if bills are issued with a notation of bad condition they will not be accepted by insurance companies or bankers in Spain, but if such note be omitted they will pass, upon the assumption that the goods have been shipped in apparent good order and condition. Upon this assumption, the bills were passed and payment made. Under these circumstances, the omission of the notation in respect of the condition of the goods was nothing short of a suppression of the truth in order to further the fraudulent designs of the shippers. Upon every principle of fair dealing it should be regarded as the equivalent of a false notation of good condition which the ship is estopped to deny as against the claims of the consignees who relied upon it. To hold otherwise is to permit the wrongdoer to take advantage of his own misconduct, which a court of admiralty cannot allow with due regard for those equitable principles by which it is governed.

I am authorized to say that the CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.

FULTON NATIONAL BANK OF ATLANTA *v.* HOZIER[1] INTERVENER; AND SMITH, ET AL., AS RECEIVERS OF IMBRIE & COMPANY.

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

No. 260. Submitted January 27, 1925.—Decided March 2, 1925.

1. A controversy is not dependent or ancillary unless it has direct relation to property or assets drawn into the court's possession or control by the principal suit. P. 280.
2. Jurisdiction over a suit to administer the assets of an insolvent firm of stockbrokers does not empower the District Court to entertain as dependent or ancillary a controversy between a customer of the firm and a national bank (citizens of the same state), over money paid the firm by the customer to buy stocks and deposited by the firm in the bank, and which the bank has set off against notes owing it by the firm, but which the customer claims as equitably his, free from the firm's obligations. *Id.*

295 Fed. 611 reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a judgment of the District Court which decreed that its receivers recover from the petitioner Bank the amount of a claim made by the respondent Hozier, as intervener, and pay it to the intervener or his counsel. See also 287 Fed. 158.

Mr. Marion Smith, Mr. John D. Little, Mr. Arthur G. Powell and *Mr. Max F. Goldstein* for petitioner.

The controversy between Hozier and the bank over the chose in action was not a controversy over property drawn into the custody of the court in the main bill, and was not, therefore, a dependent controversy or within the jurisdiction of the federal court. *Union Electric Co.* v. *La. Electric Co.,* 68 Fed. 673; *Forest Oil Co.* v. *Crawford,* 101

[1] The name of the intervener appears in the record as Hozier, Hosier and Hoosier. The first version is adopted here as the correct one, following his petition in intervention and his counsel's brief.

Fed. 849; *Newton* v. *Gage,* 155 Fed. 598; *Venner* v. *Pa. Steel Co.,* 250 Fed. 290; *Mass. Loan & Trust Co.* v. *Kansas City R. Co.,* 101 Fed. 30; *Continental Co.* v. *Alice Chalmers Co.,* 200 Fed. 601.

The result of the controversy would not affect the aggregate amount of the receivers' obligations, because the extent to which Hozier's claim was reduced, if he recovered from the bank, would automatically increase the amount of the bank's claim. A mere remote interest of this kind in the receivers is not sufficient to abrogate the rule that an intervention *pro interesse suo* is not a " dependent controversy " unless it relates to property drawn into the constructive custody of the court by the main bill. *Carey* v. *McMillan,* 289 Fed. 380.

Mr. Arthur Heyman for respondents. *Mr. Albert Howell Jr.* and *Mr. Hugh M. Dorsey* were also on the brief.

The court had jurisdiction of the Hozier intervention and to make Fulton National Bank a party.

The District Court for the Northern District of Georgia assumed charge of the Atlanta agency of Imbrie & Company, appointed receivers, and gathered into its custody and possession all of the assets of that company in this jurisdiction. Hozier had a claim against the Atlanta agency. He was by the terms of the order appointing receivers enjoined from taking any independent steps to prosecute his rights against that agency, and necessarily would be without remedy unless allowed by the court to intervene in the cause in which the court had gathered to itself all of the assets. Hozier having the right to intervene, it would seem clear under the authorities that the court was authorized to bring into the proceedings all parties whose presence would be necessary or proper to a complete adjudication of the issues involved. *White* v. *Ewing,* 159 U. S. 36; *Porter* v. *Sabin,* 149 U. S. 473;

Bottom v. *National Association,* 123 Fed. 744; *Peck* v. *Elliott,* 79 Fed. 10; *Ross-Meehan Co.* v. *Iron Co.* 72 Fed. 957; *Hollander* v. *Heaslip,* 222 Fed. 808; *Hume* v. *New York,* 255 Fed. 488; *Pell* v. *McCabe,* 256 Fed. 512; *Gas & Electric Co.* v. *Manhattan Co.* 266 Fed. 625; *Equity Rule* No. 37; *Rhinehart* v. *Victor Co.* 261 Fed. 646; *Simkins Federal Equity Suit,* p.p. 467, 482; *Consolidated Gas Co.* v. *Newton,* 256 Fed. 238; *Cincinnati Co.* v. *Indianapolis Co.* 279 Fed. 356; *Rocca* v. *Thompson,* 223 U. S. 317; *Caldwell* v. *Taggart,* 4 Pet. 190.

See also the discussion on the question of jurisdiction in the case at bar by the courts below.

Mr. Justice McReynolds delivered the opinion of the Court.

This cause arises from an intervention petition filed by respondent Hozier in a proceeding to administer the assets of Imbrie & Company, a partnership, pending in the United States District Court, Northern District of Georgia. The following statement from the opinion of that court (287 Fed. 158, 159) sufficiently indicates the material issues—

"On March 3rd, 1921, in the District Court of the United States for the Southern District of New York, was filed a creditors bill against Imbrie & Company, stock and bond dealers and brokers, citizens of New York, New Jersey and Massachusetts, whose principal place of business was New York. Receivers were appointed. On the same day, in the Superior Court of Fulton County, Georgia, other creditors, citizens of Georgia, sought and obtained a receiver for assets of Imbrie & Company in Georgia connected with a branch office operated in Atlanta. On March 7th, 1921, the New York receivers, by direction of the New York court, applied for ancillary receivership in this court and were, with the State Court receiver, made such ancillary receivers. On March 8th,

Imbrie & Company removed to this Court the case in the Fulton Superior Court. The two proceedings were then consolidated by consent, and numerous interventions have been allowed in this Court, among them that of I. S. Hozier. His claim, in brief, is that he gave Imbrie & Company in Atlanta, on February 21st, 1921, a check for $2656.13, to be used as his brokers in buying certain stocks; that Imbrie & Company deposited it to their credit in Fulton National Bank on February 23rd; that the proceeds of its collection were still to the credit of Imbrie & Company at said bank, though in equity belonging to Hozier, when the firm failed without having bought the stock, whereupon Fulton National Bank on March 3rd, offset certain notes it held against Imbrie & Company against the deposit, absorbing it. Hozier prays that the bank be made a party and be required to pay the $2656.13 to the receivers or to him. By an amendment he asks also a judgment against the estate in the receivers' hands, with a first lien or otherwise, if the bank could not be required to repay the money to them for him. This intervention was allowed, the bank was made a party and the issues made by answers to the intervention referred to a Master. Exceptions to his report raise three principal questions: First, has this Court, as a Federal Court, jurisdiction of this controversy; second, should it pass upon it or remand the parties to the primary jurisdiction in New York; third, on the merits has the bank the right to make the setoff as against Hozier."

The trial court held that it had jurisdiction to entertain the intervention petition as a dependent controversy, and decreed—"That the receivers in the above stated consolidated cause recover from the Fulton National Bank of Atlanta the principal sum of twenty-six hundred fifty-six and 13/100 dollars ($2656.13), together with interest at the rate of seven per cent. (7%), per annum from the date of this judgment, and upon the recovery of same, that

said receivers pay said amount to I. S. Hozier, intervener, or his counsel of record."

The Circuit Court of Appeals affirmed this judgment. The cause is here by certiorari. It is insisted that the trial court erred, (1) in assuming jurisdiction of the intervention petition, and (2) in holding the bank liable for the amount of the deposited check.

We are of opinion that in no proper sense was the petition dependent or ancillary to the cause instituted for the purpose of administering the assets of Imbrie & Company. Consequently, the trial court could not entertain it.

The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. *Hoffman* v. *McClellan,* 264 U. S. 552, 558, and authorities there cited. And see Simkins' Federal Practice, pp. 740, 741. All parties seem to recognize this doctrine; they differ concerning its application to the facts presented by the present record.

The proceeding under consideration cannot properly be called a suit by a receiver, on authority of the appointing court, to collect assets or to defend property rights. It was begun to recover property, claimed by a customer of the insolvent firm, which had passed into the hands of a third person.

Hozier might have proceeded against the bank by an original proceeding and demanded adjudication of his claim to the alleged trust fund—pursued thus something which he insisted belonged to him and was unjustly withheld by the bank. This course was successfully taken in *Union Stock Yards Bank* v. *Gillespie,* 137 U. S. 411.

As between Imbrie & Company, or the receivers appointed to administer their assets, and the bank, the

latter had the superior claim to the deposit or credit here involved—whether it could be required to account to the customer as for his money was a question between them. *Bank of Metropolis* v. *New England Bank,* 1 How. 234, 6 How. 212; *Wilson & Co.* v. *Smith,* 3 How. 763; *National Bank* v. *Insurance Co.,* 104 U. S. 54; *Union Stock Yards Bank* v. *Gillespie, supra.* There were no funds in the receivers' possession and none subject to their demand as to which Hozier asserted any right—his claim was against something in the bank's possession and beyond the receivers' reach. His petition sought to compel them to litigate with the bank for his sole interest and without possibility of benefit to the estate. As shown by the decree quoted above, the expected fruit of the litigation was for petitioner alone. He had no right to bring the bank, which for jurisdictional purposes was to be deemed a citizen of Georgia (Jud. Code, § 24, Subdiv. 16), into the Federal court or to interfere with the affairs of the estate by injecting this controversy concerning which the receivers had no material interest—wherein the estate might lose much but could gain nothing.

The decree is reversed. The cause will be remanded to the District Court. The costs in all the courts will be taxed against the intervener—respondent here.

Reversed.

UNITED STATES *v.* CORNELL STEAMBOAT COMPANY.

Appeal from the Court of Claims.

No. 265. Argued January 28, 29, 1925.—Decided March 2, 1925.

Tug-boats were chartered to the United States for a per diem for each and every day of the charter period, the owner agreeing to furnish everything for them, except coal and water, which were to be furnished by the United States; the Government had the entire use of the boats and they were subject at all times to the orders

and directions of its officers. *Held,* a demise; and that the United States was not entitled to make deductions from the owner's monthly bills for loss of service caused by short crews, ill condition, delay in taking on supplies, and by the sinking of one of the boats, which was raised and repaired by the owner. P. 286.

58 Ct. Clms. 497, affirmed.

APPEAL from a judgment of the Court of Claims allowing the claimant, appellee, recovery of deductions made by the United States from the bills rendered by the claimant under a charter of tug-boats.

Mr. J. Frank Staley, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the briefs, for the United States.

The rule announced in this Court in *New Orleans-Belize S. S. Co.* v. *United States,* 239 U. S. 202, determines that the charters of the tugs in this case were contracts for hire and did not constitute a demise. See also *The Spokane,* 294 Fed. 242; *Bramble* v. *Culmer,* 78 Fed. 497; *Clyde Commercial S. S. Co.* v. *West India S. S. Co.,* 169 Fed. 275.

The charters gave the use of tugs, some for a day of 12 hours, others for a day of 24 hours, at a daily rate. The letting for a 12-hour day is inconsistent with a demise of the boat.

The owner, by express terms, agreed to supply everything in connection with the maintenance and operation of the tugs, with the exception of coal and water, which the Government was to furnish. The owner undertook to provide and pay the crew. The charterer was without authority to nominate or select the officers and crew or to discharge or discipline them. The owner provided subsistence for the crew, ship's stores, including oil for engines and machinery, assumed all responsibility for keeping the tugs equipped and in proper running order and condition without limitations of any kind.

The practice of submitting accounts monthly, clearly denies that the Government considered the agreement a demise of the vessel. To the contrary it insisted that the owner properly man and equip its tugs as provided and it denied the right to discipline the crews for lax attention in the handling of the tugs; rather it imposed upon the tugboat owner penalties for its failing to provide full crews and to discipline the officers and crew, which it regarded owner's duty.

Again when the *Ira Hedges* sank, the owner at its own expense raised the vessel and repaired it. This it was bound to do by the terms of the charter. If the charter is to be read as a demise of the tugs, such loss would have been borne by the Government as *pro hac vice* owner, and not by the owner.

It is common knowledge that tugs employed in harbor service keep a log of the movements of the tug and the services they perform covering every day, whether the tugs are in the service of the owners or if they are hired to others. The fact that such logs were kept under the direction of the Army Transport Service can not be considered a factor determining the arrangements a demise.

Courts are not inclined to regard the contract as a demise of the ship if the end in view can be accomplished without the transfer of the vessel to the charterer. *Reed* v. *United States,* 11 Wall. 591. See *Leary* v. *United States,* 14 Wall. 607; *Donald* v. *United States,* 39 Ct. Clms. 357; *Plant Investment Co.* v. *United States,* 45 Ct. Clms. 374. *United States* v. *Shea,* 152 U. S. 178, distinguished.

Mr. Robert S. Erskine, with whom *Mr. John M. Woolsey* was on the brief, for appellee.

The judgment rests upon findings of fact. These cannot now be questioned by the Government.

The surrounding circumstances, as shown by all the facts, in each case, determine whether or not a charter is a demise. *United States* v. *Shea,* 152 U. S. 178; *Leary* v. *United States,* 14 Wall. 607.

The findings here support the ruling that the charters demised the tugs to the Government. *The Charlotte,* 285 Fed. 84; s. c. 299 Fed. 596; *Hahlo* v. *Benedict,* 216 Fed. 303; *The Del Norte,* 119 Fed. 118.

There are three classes of charter parties, in two of which the vessel is always let or hired for an agreed period of time. (a) a demise; *The Barnstable,* 181 U. S. 464; (b) a time charter, or ordinary hiring of the vessel, not constituting a demise; *S. S. Co.* v. *West India S. S. Co.* 169 Fed. 275; (c) voyage charter, or contract of affreightment; *Texas Co.* v. *Hogarth Shipping Co.* 256 U. S. 619.

The demise and ordinary time charter are alike in that, under both forms, the vessel is let or hired for an agreed period of time, and hire is to be paid, at a specified rate, from the beginning to the end of the charter period, unless there is some express exception providing for suspension of hire.

The principal difference between the two forms is that under a demise the ship's officers and crew become, even in matters of navigation and care of the vessel, the agents of the charterer, while under an ordinary time charter the officers and crew remain the agents of the owner with respect to the navigation and care of the ship.

The third class referred to is obviously not involved in the case at bar.

The error in the appellant's argument lies in its failure to recognize the fact that even if the charters here did not constitute a demise (which the lower court held they did), they must still fall in the second class, as time charters; and, in either class, the contract is for the use of the vessels

for an agreed period of time, with the corresponding promise to pay hire from the beginning to the end of the agreed period.

Even under ordinary time charters, the law requires continuous payment of hire from beginning to end of the entire period, where the charters do not contain any exceptions. *Carver on Carriage of Goods by Sea* (6th Ed.), p. 741; *Scrutton on Charter Parties and Bills of Lading* (10th Ed.), 382; *Atlantic Fruit Co.* v. *Solari,* 238 Fed. 217; *The Santona,* 152 Fed. 516; *Havelock* v. *Geddes,* 10 East. 555; *Ripley* v. *Scaife,* 5 B. & C. 167.

In the absence of a specific exception in the contract, the only excuse which the charterer could offer for the cessation of hire, even under a time charter not constituting a demise, would be a frustration of the adventure. *The Frankmere,* 262 Fed. 819, 278 Fed. 139; *The Claveresk,* 264 Fed. 276; *The Isle of Mull,* 278 Fed. 131.

The Government cannot now support its position by a belated suggestion that it is entitled to an off-set on account of alleged negligence of the owner of the tugs

Mr. Justice McReynolds delivered the opinion of the Court.

This proceeding was instituted to recover the sum of deductions made by the United States from monthly bills rendered by appellee for the hire of tugs.

During 1917 and 1918, under informal charters evidenced by letters, appellee hired twelve tugs to the United States for use in and about New York Harbor. The specified price was "for each and every day of the charter period," and the owner agreed "to furnish everything for these tugs with the exception of coal and water which you are to furnish."

The vessels reported for service in accordance with the several contracts and the plaintiff rendered monthly bills

at the per diem rate stated therein. Those for December, 1917, were paid as rendered. Thereafter deductions were made which amounted in all to $24,822.48. They were based upon the vessels' logs, kept by their captains and engineers as directed by the Army Transport Service, and were entered if a boat reported with a short crew, or not in condition to perform the service required, or if too long a time was consumed in taking on supplies. The owner saved its rights through proper claims and protests.

While in the service of the United States the "Ira M. Hedges" sank. It was raised and repaired by and at the expense of the owner, and was subsequently used by them. One of the challenged deductions was for loss of time incident to this accident.

"During the time when the tugs hereinbefore mentioned were in the service of the Government, the Army Transport Service had the entire use of the tugs and they were subject at all times to the orders and directions of the officers of the Government, and at no time during the period did the plaintiff have the use of and [it] did not in any way interfere with or direct the operations of the said tugs."

The United States maintain that the owner did not part with possession, command and navigation during the charter periods; that the charter was for service, and not a demise; and that consequently they rightly made deductions for the time the vessels were not at their disposal.

Relying upon the doctrine approved in *United States* v. *Shea*, 152 U. S. 178, the Court of Claims concluded that the charter amounted to a demise and that the deductions were not permissible. It accordingly sustained the claim of the owner, appellee here. Accepting the facts as found, we agree with that conclusion and affirm the judgment.

Affirmed.

CHICAGO GREAT WESTERN RAILROAD COMPANY *v.* SCHENDEL, ADMINISTRATOR OF THE ESTATE OF RING, DECEASED.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 422. Argued January 6, 1925.—Decided March 2, 1925.

1. Where a freight car with defective automatic coupler was moved with the train from the main line to a siding to be cut out and left there, *held* that the use, movement or hauling of the car, within the meaning of the Safety Appliance Act, had not ended when a brakeman went between it and the next car to detach the chain and was injured by the movement of the car by gravity as the engine was cut off; that he was within the protection of that statute; and, under the Employer's Liability Act, his assumption of the risk, or contributory negligence in going between the cars with knowledge of the danger and without notice to the engineer did not bar his right of action. P. 291.

59 Minn. 166, affirmed.

CERTIORARI to a judgment of the Supreme Court of Minnesota which affirmed a judgment for damages recovered against the railroad company for personal injuries of a brakeman resulting in death.

Mr. Asa G. Briggs, with whom *Mr. Charles H. Weyl*, *Mr. Allan Briggs* and *Mr. Allen V. Junkin* were on the briefs, for petitioner.

The facts do not bring the case within the Safety Appliance Act. The car had come to rest on the sidetrack and had ceased to be "used" as contemplated by the act.

The association of the word "used" with the words "hauled or permitted to be hauled on its line" clearly indicates that the use must be associated with or related to the transportation or hauling of a crippled car, either in transportation from place to place or of the car from the place where found to be defective or insecure to the

place of repair. It does not mean such use of the car elsewhere or in other relation than such hauling or movement. *McCalmont* v. *Penn. R. Co.,* 273 Fed. 231; s. c. 283 Fed. 736.

Let us examine the immediate facts of the case. The draw-bar had pulled out on the main line. The car was then chained up and hauled onto the sidetrack, to be cut out of the train. During this movement nothing occurred. The car was safely hauled to a place on the siding where it was to remain. Having so been placed on this sidetrack, it ceased to be "used" by the carrier. From this time on, then, the Safety Appliance Act did not govern the case.

If intending to permit a car to stand still constituted a violation of the act, the company could have no alternative but to violate. If they hauled the car they violated the act, and if they did not haul the car they violated the act. See *Boldt* v. *Penn. R. Co.,* 245 U. S. 441.

The defective draw-bar did not proximately contribute to the injury in this case. *Gilman* v. *Central Vermont Ry.,* 107 Atl. 122; *McCalmont* v. *Penn. R. Co., supra; Great Northern Ry. Co.* v. *Wiles,* 240 U. S. 444; *Rittenhouse* v. *St. L. etc. Ry. Co.,* 252 S. W. 945; *Davis* v. *Hand,* 290 Fed. 73; *Phillips* v. *Penn. R. Co.,* 283 Fed. 381.

The deceased would not have been in the position he was except for the defect in the coupler. Beyond this there is no connection between the defective coupler and his injuries. *Douglas* v. *Washington Terminal Co.,* 298 Fed. 199.

The probability that an injury would be caused by the alleged violation of the Safety Appliance Act was so unlikely, under all the circumstances, that it could not reasonably be foreseen. *Lang* v. *New York Cent.,* 255 U. S. 455. *Otos Case,* 239 U. S. 42, distinguished.

Mr. Tom Davis, with whom *Mr. Ernest A. Michel* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The Supreme Court of Minnesota affirmed a judgment in favor of respondent for damages resulting from the death of his intestate, Ring, fatally injured while in petitioner's service and while both were engaging in interstate commerce. The original action was based upon the Federal Employers' Liability Act, c. 149, 35 Stat. 65, 66, and the Safety Appliance Act of 1893, c. 196, 27 Stat. 531, as amended in 1910, c. 160, 36 Stat. 298, 299.

While the freight train upon which Ring served as brakeman was upon the main line at Budd, Iowa, a drawbar pulled out of a car. Thereupon the crew chained this car to the one immediately ahead. The engine pulled the whole train onto the adjacent siding, which lies on a gentle grade, and stopped. The intention was to detach the damaged car and leave it there. The plan was to cut off the engine, bring it around back of the train, remove the rear portion, couple this to the forward portion and move on. Acting under the conductor's direction, Ring asked the head brakeman to tell the engineer to proceed; and then, without the knowledge of either of the others, he and the conductor went between the crippled car and the next one, in order to disengage the connecting chain. While they were working there the engineer cut off the engine, the car ran slowly down the grade, and Ring, caught by the chain, suffered fatal injuries.

A rule of the company provided that employees should advise the engineer when they were going between or under cars and must know that he understood their purpose before they put themselves in any dangerous position. Ring gave no such warning, although familiar with the rule and with the grade upon which the train stood.

Petitioner insists: (1) The facts do not bring the case within the Safety Appliance Act since the car had come to rest on the side-track and had ceased to be "used," within the meaning of the statute. (2) The defective draw-bar did not proximately contribute to the injury. (3) The violation of the rule by Ring constituted negligence subsequent to and independent of the question of a defective safety appliance and was a proximate cause of the injury.

It is provided by the original Safety Appliance Act—

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The amendment of 1910 directs—

"Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation . . . *Provided,* That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by Section four of this Act, or Section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and

such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this Section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to. . . ."

The Employers' Liability Act provides that in an action under it for injury or death of an employee, " such employee shall not be held to have assumed the risks of his employment [or to have been guilty of contributory negligence] in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Former opinions have adequately explained the purpose of these enactments. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 295; *Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S. 559; *St. Louis & San Francisco R. R. Co.* v. *Conarty,* 238 U. S. 243; *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall,* 244 U. S. 66; *Lang* v. *New York Central R. R. Co.,* 255 U. S. 455; *Davis* v. *Wolfe,* 263 U. S. 239. *Louisville & Nashville R. R. Co.* v. *Layton,* 243 U. S. 617, must be understood as in entire harmony with the doctrine announced in *St. Louis & San Francisco R. R. Co.* v. *Conarty,* and not as intended to modify or overrule anything which we there said.

Under the circumstances disclosed, we think it clear that the use, movement or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident. To cut this car out of the train so

that the latter might proceed to destination was the thing in view, an essential part of the undertaking in connection with which the injuries arose.

The things shown to have been done by the deceased certainly amount to no more than contributory negligence or assumption of the risk, and both of these are removed from consideration by the Liability Act. When injured he was "within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and draw-bars of standard height. . . . His injury was within the evil against which the provisions for such appliances are directed." *St. Louis & San Francisco R. R. Co.* v. *Conarty, supra.* He went into the dangerous place because the equipment of the car which it was necessary to detach did not meet the statutory requirements especially intended to protect men in his position.

We find no material error in the judgment below, and it is

Affirmed.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., OPERATING PHILADELPHIA & READING RAILWAY, *v.* NEWTON COAL COMPANY.

DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC., OPERATING PENNSYLVANIA RAILROAD, *v.* NEWTON COAL COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Nos. 709 and 710. Argued January 12, 1925.—Decided March 2, 1925.

1. While coal which plaintiff had purchased through contracts with producers was in course of transportation over railroads then under Federal Control, it was commandeered by the Director General of

Railroads, acting under orders of the Fuel Administrator, for use in operating the railroads, and he paid the producers the prices fixed by the Fuel Administrator, which were the same as the prices named in plaintiffs' contracts. *Held*

(*a*) That the plaintiff was entitled to be paid the difference between prices thus paid to its vendors and the market value, which was higher. P. 301.

(*b*) That by § 206 (a) of Transportation Act, 1920, actions therefor could be maintained in the state court against the agent designated by the President under that Act. P. 301.

281 Pa. St. 74, affirmed.

ERROR to a judgment of the Supreme Court of Pennsylvania affirming recoveries from the Director General of Railroads, as agent under the Transportation Act, 1920, on account of coal seized and appropriated for operating railroads while under Federal Control.

Mr. Wm. Clarke Mason, with whom *Mr. John Hampton Barnes* and *Mr. Charles Myers* were on the brief, for plaintiff in error.

At the time of the transactions, January and February, 1920, the war with Germany had not terminated and therefore any powers which the Government had incident to the war still remained. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146.

It must be assumed that all of the orders made by the President or his agents under § 25 of the Lever Act were made "for the efficient prosecution of the war" unless the contrary appears on the face of such orders. The orders here definitely show that they were made on account of the war emergency. All of the orders, both executive and those made by the Fuel Administration, refer to the Act of Congress of August 10th, 1917. The executive order of October 30th, 1919, states in its preamble ". . . whereas it is necessary to restore and maintain during the war certain of said rules, regulations, orders and proclamations . . ."

The Fuel Administration order of October 31st, 1919, states that it is made on account of the "present emergency" and it must be assumed that this means the war emergency.

It would be a most unwise policy to allow courts to enquire into the motives of the executive branch of the Government in making orders during the war emergency in order to determine their validity.

The state court in its opinion, however, said that the testimony showed that the Fuel Administrator in issuing the orders under consideration did not act on account of the war emergency but on account of the threatened coal strike and, therefore, the orders were invalid. Section 2 of the Lever Act provides "that in carrying out the purposes of this Act the President is authorized to create or use any agency or agencies." Congress delegated certain of its powers by this act to the President and the Fuel Administrator was the President's duly authorized agent in issuing orders, so that these orders were substantially the acts of Congress and, therefore, the first answer to the reasoning of the court below is that the court has enquired into the motive of Congress in determining the validity of the orders. The second answer is that there is no evidence to justify the finding that the orders were issued solely because of the coal strike, but on the contrary the evidence shows that the conditions existing because of the war emergency were made more alarming by the additional shortage due to the strike.

The conclusion of the State Supreme Court is in direct conflict with decisions of this Court. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51.

The fact and date of the termination of the war had not been ascertained and proclaimed by the President in the manner fixed by Congress at the time the events under consideration took place, and this fact of termination was not ascertained and proclaimed until after the orders which are attacked in these cases were suspended.

The orders under consideration did not violate the Fifth Amendment by the method provided to fix compensation.

The question must be approached in the light of the facts, and the answer must take into consideration the identity of the divertee. The diversion was by the agency of the Fuel Administrator and the use of the diverted coal was by the Director General of Railroads, which were the first preferred consumers on the fuel administration list. If the railroads had been privately operated at the time of diversion this case would present substantially the facts found in *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, and the conclusions should be the same as there. If the fact of Government operation requires the diversion to be treated as a requisitioning under § 10 of the Lever Act for use by the United States of America, then a totally different case is developed. In the latter event the sole cause of action would seem to be under that section of the Lever Act, and the rule of *United States* v. *New River Collieries Co.*, 262 U. S. 341, would probably apply.

In several decisions of the lower federal courts the constitutionality of the Lever Act has been assumed, and there seems to have been but one federal decision which has discussed and adjudicated the constitutionality of the applicable sections of the Lever Act, *Ford* v. *U. S.* 281 Fed. 298. This Court reversed that decision (264 U. S. 239), but did so solely on the ground that the Lever Act did not apply to the coal involved. See *Lajoie* v. *Milliken, et al.*, 242 Mass. 508.

Congress is given certain powers in war time which even the Fifth Amendment does not limit or restrict. The power to restrict the liquor traffic is one, as stated in *Hamilton* v. *Kentucky Distilleries Co., supra,* at page 156, for the reason that this is an appropriate means of increasing war efficiency. Is not this war efficiency just as much affected by the use, distribution and price of coal?

The contracts between the Coal Company and the shippers, show that the Coal Company agreed that the coal to be shipped under the contracts would be subject to the regulations of the Fuel Administration, including of course the orders, such as those under consideration, to be thereafter issued. In the case of *Vogelstein* v. *United States,* 262 U. S. 337, this Court held that one who cooperated with others in putting into effect and maintaining a price established by the Government could not later recover a greater price, and the same reasoning would seem to apply to the claim of the defendant-in-error. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188.

The origin of the Fuel Administrator and the Federal Agent is in the federal statutes, and both are agencies of the President. One derived his powers, however, from the Lever Act and the other from the Transportation Act. There is no authority given to the Federal Agent under § 206 of the latter act to answer for the acts of the agencies of the Fuel Administration under § 10 of the Lever Act, or under the general power of condemnation of the Federal Government, but merely for those causes of action for which the carriers would have been otherwise liable.

The Director General as Federal Agent, plaintiff-in-error in these cases, admits his liability under the orders of the Fuel Administrator to pay the proper price for coal lawfully diverted to the Director General and lawfully used by the Director General in the operation of the railroads. He has assumed that the payment of the price fixed by the Fuel Administration discharged this liability; but if authority was lacking to fix such price, then for the coal lawfully diverted he is liable for such price as may be judicially determined.

The clear distinction which this Court has drawn between the several capacities in which the Director General functioned is found in *Dahn* v. *Davis,* 258 U. S. 421;

Dupont v. *Davis,* 264 U. S. 456; *North Carolina Ry. Co.* v. *Lee,* 260 U. S. 16; *Missouri R. R.* v. *Ault,* 256 U. S. 554; *Davis* v. *Donovan,* 265 U. S. 257; *Davis* v. *O'Hara,* 266 U. S. 314.

Mr. Allen S. Olmsted, 2d, with whom *Mr. Wm. A. Glasgow, Jr.,* was on the brief, for defendant in error.

The post-war fuel regulations of 1919–20 were not within the President's statutory power to regulate the distribution of coal " whenever in his judgment necessary for the efficient prosecution of the war."

The Government, having taken and used the coal, must pay its fair value, judicially determined.

Section 25 of the Lever Act, which gives the President power to fix prices, also provides that in fixing the prices, he shall cause a careful inquiry to be made into costs and other factors affecting the price. There is no pretense that such an inquiry was made here. The price paid by the divertee of this coal was fixed in a series of orders, of which the latest is dated May 24, 1918. The Government control of prices had been lifted on January 31, 1919, and there followed nine months of free trading. Suddenly on October 30, 1919, the President revived the 1918 prices. Current prices, as this record shows, and the trial court found, were far higher than the 1918 prices. Under such circumstances we submit that, even though the diversions were lawful, the 1918 prices were not binding, and therefore, even though the Director General were a private citizen, the payment of the 1918 price would not protect him in a suit by the owner of the coal.

But the Director General was not a private citizen. A suit against him " is an action against the United States." *Davis* v. *O'Hara,* 266 U. S. 314, and cases cited. *Corona Coal Co.* v. *United States,* 263 U. S. 527. Plaintiff-in-error stresses the dual capacity of the Director General. As Fuel Administrator he diverted the coal; as Railroad

Operator he received it. This is but another way of saying that the Government both took and used the coal. How much must it pay for it?

Even the plaintiff-in-error, in answering that question, concedes that the rule of *United States* v. *New River Collieries Co.* 262 U. S. 341, would probably apply. *National City Bank* v. *United States,* 275 Fed. 855, s. c. 281 Fed. 754, 263 U. S. 726; *Vogelstein* v. *United States,* 262 U. S. 337.

This suit was properly brought against the Director General under § 206a of the Transportation Act, 1920.

If the orders were invalid, the taking was wrongful and all who participated in the transactions were trespassers in their own wrong. That the Director General is liable for torts committed by railroad employees is well settled. *Missouri Pacific R. Co.* v. *Ault* 256 U. S. 554; *Director General* v. *Kastenbaum,* 263 U. S. 25.

If the taking be assumed to be lawful, the Director General is none the less liable. In the pleadings he admits he is the proper defendant and counsel reiterates that admission.

These suits come exactly within the language of the statute. The cause of action arises out of Federal Control. It is of such character as prior to Federal Control could have been brought against a corporate carrier; for surely an action lies against a corporation to recover the value of property to which it has rightfully obtained title, e. g., by eminent domain, or under contract.

It is, we submit, irrelevant that an action would also lie against the United States *eo nomine,* under § 10 of the Lever Act.

Mr. Justice McReynolds delivered the opinion of the Court.

These causes present the same points of law and were heard together both here and below. No disputed question of fact remains. In 1919 defendant in error, a

Pennsylvania corporation, doing business at Philadelphia, contracted with producers for large quantities of bituminous coal, f. o. b. the mines, subject to the regulations of the United States Fuel Administration. During January and February, 1920, while thirty-three cars of coal consigned to the corporation under these contracts were moving over the Philadelphia & Reading Railway, the Director General of Railroads took possession of them and used the fuel for operating trains on that line. Eighty cars loaded with the same character of coal and moving on the Pennsylvania Railroad were similarly treated. The claim is that the Director General took this action under lawful rules and orders of the President, acting through the Fuel Administrator and pursuant to the Lever Act, approved August 10, 1917, c. 53, 40 Stat. 276, 279, 284. The producers of the coal were paid the prices specified in the contracts of purchase, as required by the Fuel Administrator; and it is now maintained that nothing more can be demanded by the owner. The owner's claim is for the difference between the amount received by producers and the market value of the coal—approximately $1.44 per ton.

The Lever Act conferred upon the President certain powers to regulate the prices and distribution of fuel, to be exercised for the efficient prosecution of the war. August 23, 1917, he delegated these powers to a Fuel Administrator, who freely used them during the continuation of hostilities. Shortly after the armistice substantially all such regulations were suspended and the Administrator ceased to function; but his appointment was not canceled or revoked.

On October 30, 1919, the President undertook to restore former orders and to empower the Fuel Administrator, as occasion might arise, to change or make regulations relative to the sale, shipment and apportionment of bituminous coal as the latter might think necessary. The next

day the Administrator delegated to the Director General of Railroads the power to divert coal upon the railroads as might seem "necessary in the present emergency to provide for the requirements of the country." March 19, 1920, the President suspended all fuel regulations.

Seeking to recover the difference between the amounts paid to the shipper—the purchase price—and the market value of the coal, defendant in error commenced these proceedings (June, 1921), in a state court at Philadelphia, against the Agent appointed by the President under the Transportation Act, 1920, c. 91, 41 Stat. 456, 461. Judgments went for it and were affirmed by the Supreme Court. 281 Pa. 74. The latter court held: That the war with Germany had ceased prior to October 30, 1919, and the purpose of the President's order then issued was to meet an emergency incident to the miners' strike—not to provide for the efficient prosecution of the war. Also that seizure and use of the coal by the Director General rendered the United States liable for just compensation, measured by market value. And, further, that the Director General was not an innocent third person to whom property has been delivered by the sovereign for the public welfare, but an agency of the United States for operating the railroads, and, under the Transportation Act, 1920, plaintiff in error might be sued upon claims arising therefrom.

The plaintiff in error now insists: That the order of October 30, 1919, and the regulations issued by the Fuel Administrator and the Director General of Railroads acting thereunder, were authorized by the Lever Act. That by diverting the coal to himself the Director General incurred no obligation except to pay the amounts due the shippers under the sale contracts—the compensation fixed by the orders. That the act of the Director General in diverting the coal to himself and its use on the railroads imposed no liability for which an action can be main-

tained against the Agent provided for by the Transportation Act.

From the facts stated it appears, plainly enough, that one hundred and thirteen cars of coal belonging to defendant in error were seized by the United States while upon the lines of carriers under their control and thereafter appropriated and used in the operation of such roads. The taking was for a public use. The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment. As announced in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, 344, "where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation" to which the owner is entitled. Also, "the ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

Transportation Act, 1920, § 206(a)—

"Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

If the Philadelphia & Reading Railway Company or the Pennsylvania Railroad Company, while operating its own line, had seized and used the coal as the United States did while they operated those roads, the jurisdiction of the state court of actions to recover damages or compensation would be clear. And so, under the Transportation Act, that court properly entertained the proceedings now before us.

Affirmed.

UNITED STATES *v.* ARCHIBALD McNEIL & SONS CO., INC.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 444. Argued January 9, 12, 1925.—Decided March 2, 1925.

1. In the absence of a bill of exceptions or special findings, the jurisdiction of the District Court over a law case tried by stipulation without a jury is determinable, on direct appeal to this Court, only upon the questions of law apparent on the face of the pleadings. P. 307.
2. An action in the District Court to recover just compensation for goods alleged to have been commandeered or requisitioned under the Lever Act, may be brought, under § 10 of that statute, in the District where the seizure occurred. *Id.*
3. Where a statement of claim filed in the District Court under § 10 of the Lever Act sought recovery of the value of coal alleged to have been requisitioned under that act by the President through the Fuel Administrator and used by the United States in the operation of various railroads—"a public use connected with the common defense,"—*held* that objections raised by demurrer, in terms questioning the jurisdiction upon the grounds that there had been no preliminary determination of value, and partial payment, as contemplated by the statute, and that the cause of action was for a diversion of the coal, under § 25, remediable only by action against the agent designated by the President under § 206 (a) of the Transportation Act, 1920,—did not go to the jurisdiction of the court but concerned the merits. *Binderup* v. *Pathé Exchange*, 263 U. S. 291. *Id.*

Affirmed.

JURISDICTIONAL appeal, under Judicial Code, § 238, from a judgment of the District Court awarding compensation for coal taken by the Government.

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

Whatever the allegations in the statement of claim to the effect that the suit was brought under § 10 of the Lever Act by reason of the fact that the President had commandeered coal pursuant to the provisions of that act, when it appeared that the coal was not thus commandeered but was really diverted by the Fuel Administrator for the use of railroad companies which were at the time being operated under federal control, the suit should have been dismissed, for the District Court had no jurisdiction to entertain a suit against the United States for coal thus diverted and thus used.

If these two railroads had not been under government control at this time, and the coal had been diverted to their use by the Fuel Administrator under preference regulations and the railroads had not paid for it, it will undoubtedly be conceded that the only remedy would lie in separate actions against each railroad company. Compliance with regulations of the Fuel Administrator, even though a loss is thereby incurred, will not support an action against the United States. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Coal Co.* v. *United States,* 259 U. S. 191.

The fact that the railroads were under federal control does not alter the principle. While federal control lasted the plaintiff could have sued the Director General for this coal under the Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No. 50. *Missouri Pacific R. Co.* v. *Ault,* 256 U. S. 554. After federal control ceased the plaintiff could have sued the Agent designated by the

President under § 206 (a) of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 461.

Each railroad operated under federal control was operated as a separate entity. *Missouri Pacific R. Co.* v. *Ault, supra.* Therefore on a cause of action arising out of federal operation of the Boston & Maine Railroad suit must be brought against the Agent designated by the President, and service must be had on an agent of the Boston & Maine Railroad or some person designated by the President, and the action must be brought in a court which would have jurisdiction over the Boston & Maine Railroad.

The Lever Act was passed August 10, 1917, while the railroads were under private operation. At that time no suit could have been maintained against the United States under the Lever Act arising out of the use by a railroad corporation of coal obtained by it through the Fuel Administrator. *Pine Hill Coal Co.* v. *United States, supra.*

After the Federal Control Act of March 21, 1918, and General Order No. 50, any suit for coal used upon any railroad under federal operation must have been brought against the Director General in a court which but for federal operation would have jurisdiction of a suit against the railroad company, and after federal control ceased, on March 1, 1920, the suit must have been brought against the Agent appointed by the President under that Act. Here was a complete, adequate, and, we claim, an exclusive remedy.

Mr. George Deming, for defendant in error. *Mr. Charles H. Burr* was on the brief.

Mr. Justice McReynolds delivered the opinion of the Court.

Seeking to recover $17,422.32 as compensation for 3,840.9 tons of bituminous coal, defendant in error, a

Connecticut corporation, instituted this action against the United States by filing statement of claim in the United States District Court, Eastern District of Pennsylvania.

It alleged—

That jurisdiction of the action arises under the Fifth Amendment and the tenth section of the Lever Act, c. 53, 40 Stat. 276, 279.

That the coal in question had been shipped from the mines under valid contracts during the first part of October, 1919, was owned by the claimant, and prior to October 30, 1919, was at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey.

That "by virtue of the authority conferred by the aforesaid Act of Congress, the President of the United States, acting by and through the Fuel Administrator at Port Richmond Piers, Philadelphia, or at Port Reading Piers, New Jersey, commandeered and requisitioned" this coal during November and December, 1919. "The said coal was commandeered and requisitioned from or through the Commissioner of the Tidewater Coal Exchange, the Superintendent of Transportation of the Philadelphia & Reading Railroad Company, the Shipping and Freight Agent of the United States Railroad Administration at Port Reading Terminal Piers, New Jersey, the Bituminous Coal Distribution Committee, the Regional Coal Committee, the Philadelphia & Reading Railroad Company, the Port Reading Railroad Company, the Federal Treasurer at Port Reading Terminal Piers of the United States Railroad Administration, and the Jamison Coal & Coke Company, the vendors of the said coal to the plaintiff. All of the aforesaid coal was received, accepted, retained and used by the United States of America, and used in the operation of various railroads, to wit: Boston & Maine Railroad, Maine Central Railroad; which said use was a public use connected with the common defense."

That the fair and reasonable value of the coal was $4.536 per ton f. o. b. the mines; that nothing has been

paid to claimant on account of said coal so commandeered and requisitioned, and it should have judgment for the value thereof with interest.

A motion by the United States to dismiss the action upon the ground that the claimant was a citizen of Connecticut and therefore the court lacked jurisdiction, was overruled. Thereupon, the United States interposed a demurrer and set up that the court had no jurisdiction of the cause; that the statement of claim showed no cause of action; that under the Lever Act district courts of the United States have jurisdiction of actions only after determination by the President of the value of the property taken, expression of dissatisfaction by the owner, and payment of seventy-five per centum of the determined amount; that the complaint sets forth a diversion of coal under § 25 of the Lever Act, not a requisition under § 10, and that the remedy, if any, was to sue the Agent designated by the President under § 206 (a) of the Transportation Act, 1920, c. 91, 41 Stat. 456, 461. This was overruled and the United States answered.

It was stipulated by counsel that, "a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with §§ 649 and 700 of the United States Revised Statutes." The cause was heard by the court upon the pleadings and evidence. What purports to be a transcript of the latter is printed; but it was not made part of the record by bill of exceptions. The trial judge filed an opinion and entered judgment for the claimant. No special findings were asked or made.

The cause is here by direct writ of error. The parties agree that only the question of jurisdiction is open. For the United States it is said, "the court below was without jurisdiction to render the judgment, and that is the sole question presented."

As the record contains no bill of exceptions, upon this direct writ of error we can review only questions of law apparent on the face of the pleadings in so far as they directly relate to the court's jurisdiction. *Insurance Company* v. *Folsom,* 18 Wall. 237; *Law* v. *United States,* 266 U. S. 494; Judicial Code, § 238.

Jurisdiction was invoked under the Lever Act. The claim is for something alleged to have been commandeered or requisitioned by the President, as provided by § 10, and this section confers jurisdiction without qualification upon district courts to hear and determine controversies directly resulting from such action. *Houston Coal Co.* v. *United States,* 262 U. S. 361, 365. Proceedings in the district where the seizure actually occurred are not forbidden, and seem entirely appropriate.

The allegations of the complaint were sufficient to set out a substantial claim under a federal statute. Accordingly, there was jurisdiction in the court to pass upon the questions so presented. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305.

Affirmed.

BUCK *v.* KUYKENDALL, DIRECTOR OF PUBLIC WORKS OF THE STATE OF WASHINGTON.

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

No. 345. Argued November 25, 1924.—Decided March 2, 1925.

1. Section 4, of c. 111, Laws of Washington, 1921, which prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes without having obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation, is, primarily, not a regulation to secure safety on highways, or to conserve them, but a prohibition of competition, and, as applied to one desirous of using the highways as a common carrier of pas-

sengers and express purely in interstate commerce, is a violation of the Commerce Clause, besides defeating the purpose expressed in acts of Congress giving federal aid for construction of interstate highways. P. 315.

2. A party who has received no benefit from and who does not rely upon a statute, is not estopped from assailing it as unconstitutional merely because he vainly endeavored to comply with it. P. 316.

295 Fed. 197, 203, reversed.

APPEAL from a decree of the District Court dismissing a bill for an injunction. See 295 Fed. 197; *id.* 203. The opinion is printed as amended by order, June 8, 1925.

Mr. Merrill Moores, with whom *Mr. W. R. Crawford* was on the briefs, for appellant, submitted.

The Federal Highway Act and the adoption of the provisions thereof by the State of Washington constitute a contract protected by the Federal Constitution. The provisions of the state law, c. 111, of the Laws of 1921, as amended, preventing unimpeded traffic on federal-aided highways or granting an exclusive privilege to use them in certain traffic, impair this contract and are unconstitutional. They create a monopoly; they discriminate against and prohibit the free use of these highways for traffic. *McGehee* v. *Mathis,* 4 Wall. 145; *Seabright* v. *Stokes et al.,* 3 How. 151; *Neil, Moore & Co.* v. *Ohio,* 3 How. 720; *Achison* v. *Hudleson,* 12 How. 291.

In § 2 of the federal act the term " reconstruction " was defined as including the widening or rebuilding of highways or any portion thereof, to make a continuous road sufficiently wide and strong to care adequately for " traffic " needs.

Section 8 provides that such highways must be built to adequately meet existing and probable future " traffic " needs and conditions. Further, the Secretary of Agriculture must approve the types and width, and consideration must be given probable character and extent of future " traffic."

Section 18 vests the Secretary with sole authority to administer the law, protecting the highways and the safety of " traffic " thereon.

Interstate commerce consists of intercourse and traffic between the citizens of different States.

The term " traffic " is not one of restriction, but embraces all uses of such public highways by any means or instrument of transportation, whether or not there is a charge for the use of the means or instruments by the owner thereof to others for transportation.

If § 4 of the state law, prohibiting the use of such public highways, except by one person or corporation in the same territory using such highway, is constitutional, then the State can prohibit the free use of such highways by any class either of motor vehicles or of persons, and the entire meaning of the Federal Highway Act and the protection thereof can be destroyed and a favored few would have absolute monopoly in " traffic " thereon.

The provision of the state law requiring a certificate or license to engage in interstate commerce, is unconstitutional. *McCall* v. *California,* 136 U. S. 104; *Gloucester Ferry Co.* v. *Penn.,* 114 U. S. 196; *Crandall* v. *Nevada,* 6 Wall. 35; *Welton* v. *Missouri,* 91 U. S. 275; *Hall* v. *DeCuir,* 95 U. S. 485; *Chicago & N. W. R. Co.* v. *Fuller,* 17 Wall. 560; *Luxton* v. *North River Bridge Co.,* 153 U. S. 525; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456.

A state law requiring the obtaining of a license to engage in interstate commerce in the State is unconstitutional and can not be defended as a police measure. *Crutcher* v. *Kentucky,* 141 U. S. 47; *Brennan* v. *Titusville,* 153 U. S. 289; *Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 335; *Kansas S. R. Co.* v. *Kaw Valley Drainage Dist.,* 233 U. S. 75; *Barrett* v. *New York,* 232 U. S. 14; *Wagner* v. *Covington,* 251 U. S. 95; *Kir-*

meyer v. *Kansas,* 236 U. S. 568; *Carlsen* v. *Cooney,* 123 Wash. 441.

A state law granting an exclusive privilege to engage in the business of interstate commerce over the public highways is unconstitutional. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Long* v. *Miller,* 262 Fed. 363; *Pensacola Tel. Co.* v. *West. Union Tel. Co.,* 96 U. S. 1; *United States* v. *Union Pacific R. Co.,* 160 U. S. 1; *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229; *St. Clair County* v. *Interstate Etc. Co.,* 192 U. S. 454.

The provisions of the state law are arbitrary and void.

The appellant was prohibited from entering the State of Washington, carrying persons from Portland, Oregon, at reduced fares.

It is claimed that these provisions are constitutional on the ground that Congress has not legislated on the subject. We contend that the "Federal Highway Act," furnishes a complete answer.

Even if that Act had no application, the inaction of Congress is equivalent to a declaration that such interstate commerce shall remain free and untrammeled. *Missouri* v. *Kansas City Nat. Gas. Co.* 265 U. S. 298; *Penn.* v. *West Virginia,* 262 U. S. 553; *Wabash St. L. & P. R. Co.* v. *Illinois,* 118 U. S. 557; *South Covington Ry.* v. *Covington,* 235 U. S. 538.

The power vested in Congress to regulate commerce among the States cannot be stopped at the boundary line of the State, and the absence of a law by Congress is equivalent to its declaration that the importation of the article of commerce into the States shall be unrestricted. *Leisy* v. *Hardin,* 135 U. S. 100; *Lyng* v. *Michigan,* 135 U. S. 161; *Welton* v. *Missouri,* 91 U. S. 275; *Gloucester Ferry Co.* v. *Penn., supra; Brown* v. *Houston,* 114 U. S. 622; *Walling* v. *Michigan,* 116 U. S. 446; *Vance* v. *Vandercook Co.,* 170 U. S. 457; *Hall* v. *De Cuir, supra.*

Mr. Wm. J. Hughes also appeared for the appellant.

Mr. John H. Dunbar, with whom *Mr. H. C. Brodie* was on the briefs, for appellee.

A person who has invoked the benefit of an unconstitutional law can not in a subsequent litigation aver its unconstitutionality as a defense. *Pierce Oil Co.* v. *Phoenix Refining Co.,* 259 U. S. 125; *Wall* v. *Parrot Silver & Copper Mining Co.,* 244 U. S. 407; *Grand Rapids & Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17; *Shepard* v. *Barron,* 194 U. S. 553; *Pierce* v. *Somerset Ry.* 171 U. S. 641; *Electric Co.* v. *Dow,* 166 U. S. 489; *Ficklen* v. *Shelby County,* 145 U. S. 1; *Great Falls Manufacturing Co.* v. *Garland,* 124 U. S. 581.

The state statute does not violate the federal highway acts. *Buck* v. *Kuykendall,* 295 Fed. 197; *Liberty Highway Co.* v. *Michigan Public Utilities Comm.* 294 Fed. 703.

The state act does not violate the Commerce Clause of the United States Constitution.

It has been repeatedly recognized by this Court that in matters affecting interstate commerce the States may legislate with reference to local needs where there has been no congressional legislation with respect thereto. *Minnesota Rate Cases,* 230 U. S. 352; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612; *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280; *Missouri Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412; *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utilities Comm.* 242 U. S. 333; *Penn. Gas Co.* v. *Public Service Comm.* 252 U. S. 23.

Congress has passed no act relative to interstate transportation by motor vehicles, and it has been held in numerous cases that legislation of the character here involved is of a local nature.

It has also been repeatedly recognized by this Court and the lower federal courts, that the States may, under

their police power, pass acts which indirectly affect interstate commerce, and that the regulation and use of the public highways of the State is a proper exercise of the police power. *Hendrick* v. *Maryland, supra; Kane* v. *New Jersey, supra; Interstate Motor Transit Co.* v. *Kuykendall,* 284 Fed. 882; *Northern Pac. Ry. Co.* v. *Schoenfeldt,* 123 Wash. 579; *Schmidt* v. *Department of Public Works,* 123 Wash. 705; *Camas Stage Co.* v. *Kozer,* 209 Pac. 95; *Geo. W. Bush & Sons Co.* v. *Maloy,* 143 Md. 570; *Liberty Highway Co.* v. *Michigan Public Utilities Comm. supra.*

The state act does not violate the Fourteenth Amendment. *Hendrick* v. *Maryland, supra; Geo. W. Bush & Sons Co.* v. *Maloy, supra; Camas Stage Co.* v. *Kozer, supra; Lutz* v. *City of New Orleans,* 235 Fed. 978; *Hadfield* v. *Lundin,* 98 Wash. 657; *Ex parte Dickie* (W. Va.) 85 S. E. 781; *Carson* v. *Woodram,* (W. Va.) 120 S. E. 512; *Davis* v. *Commonwealth of Mass.,* 167 U. S. 43; *Gundling* v. *Chicago,* 177 U. S. 183; *West Suburban Transportation Co.* v. *Chicago & W. T. Ry. Co.,* (Ill.) 140 N. E. 56; *Lane* v. *Whitaker,* 275 Fed. 476; *Lieberman* v. *Van De Carr,* 199 U. S. 552.

Messrs. John E. Benton and *Carl I. Wheat* filed a brief as *amici curiae.*

Mr. Justice Brandeis delivered the opinion of the Court.

This is an appeal, under § 238 of the Judicial Code, from a final decree of the federal court for western Washington dismissing a bill brought to enjoin the enforcement of § 4 of chapter 111 of the Laws of Washington, 1921. That section prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the Director of Public Works a certificate declaring that

public convenience and necessity require such operation. The highest court of the State has construed the section as applying to common carriers engaged exclusively in interstate commerce. *Northern Pacific Ry. Co.* v. *Schoenfeldt,* 123 Wash. 579; *Schmidt* v. *Department of Public Works,* 123 Wash. 705. The main question for decision is whether the statute so construed and applied is consistent with the Federal Constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington and Portland, Oregon, as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (*Carlsen* v. *Cooney,* 123 Wash. 441), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The ground of refusal was that, under the laws of the State, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington.[1] *Re Buck,* P. U. R. 1923 E, 737. To enjoin interference by its officials with the operation of the projected

[1]An additional ground for refusing the certificate was that the applicant did not appear to have financial ability. This ground of rejection does not require separate consideration; among other reasons, because the plaintiff later asserted, in his bill, that he possessed the requisite financial ability, and the motion to dismiss admitted the allegation.

line, Buck brought this suit against Kuykendall, the Director of Public Works. The case was first heard, under § 266 of the Judicial Code, before three judges, on an application for a preliminary injunction. They denied the application. 295 Fed. 197. A further application for the injunction made after amending the bill was likewise denied. 295 Fed. 203. Then the case was heard by the District Judge upon a motion to dismiss the amended bill. The final decree dismissing the bill was entered without further opinion. See also *Interstate Motor Transit Co.* v. *Kuykendall,* 284 Fed. 882.

That part of the Pacific Highway which lies within the State of Washington was built by it with federal aid pursuant to the Act of July 11, 1916, c. 241, 39 Stat. 355, as amended February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act, November 9, 1921, c. 119, 42 Stat. 212. Plaintiff claimed that the action taken by the Washington officials, and threatened, violates rights conferred by these federal acts and guaranteed both by the Fourteenth Amendment and the Commerce Clause. In support of the decree dismissing the bill this argument is made: The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare *Crandall* v. *Nevada,* 6 Wall. 35. A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the State in its discretion, without violating either the due process clause or the equal protection clause. *Packard* v. *Banton,* 264 U. S. 140, 144. The highways belong to the State. It may make provision appropriate for securing the safety and convenience of the public in the use of them. *Kane* v. *New Jersey,* 242 U. S. 160. It may impose fees with a

view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided. *Hendrick* v. *Maryland,* 235 U. S. 610. See also *Pierce Oil Corporation* v. *Hopkins,* 264 U. S. 137. With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co.* v. *Public Service Commission,* 242 U. S. 255; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat. § 3964; Act of March 1, 1884, c. 9, 23 Stat. 3, do that. The state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the State's police power.

The argument is not sound. It may be assumed that § 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while

permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways.

By motion to dismiss filed in this Court, the State makes the further contention that Buck is estopped from seeking relief against the provisions of § 4. The argument is this: Buck's claim is not that the Department's action is unconstitutional because arbitrary or unreasonable. It is that § 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot in the same proceeding both assail a statute and rely upon it. *Hurley* v. *Commission of Fisheries,* 257 U. S. 223, 225. Compare *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411. Nor can one who avails himself of the benefits conferred by a statute deny its validity.

St. Louis Co. v. *Prendergast Co.*, 260 U. S. 469, 472. But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel. Compare *Arizona* v. *Copper Queen Mining Co.*, 233 U. S. 87, 94 *et seq.*

Reversed.

Mr. Justice McReynolds dissented and delivered a separate opinion in this case and the one next following. See *post*, p. 325.

GEORGE W. BUSH & SONS COMPANY *v.* MALOY ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

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

No. 185. Argued January 16, 1925.—Decided March 2, 1925.

1. A statute of Maryland, 1922, c. 401, prohibits common carriers of merchandise or freight by motor vehicle from using public highways over specified routes without a permit; requires a commission to investigate the expediency of granting a permit when applied for, and authorizes it to refuse if it deems the granting of the permit prejudicial to the welfare and convenience of the public. *Held* unconstitutional as applied to one desirous of using the highways as a common carrier in exclusively interstate commerce. *Buck* v. *Kuykendall, ante*, p. 307. P. 323.
2. The facts that the highways here in question were not constructed or improved with federal aid, and that refusal of the permit is not mandatory under the statute but in exercise of a broad discretion vested in the commission, do not affect this conclusion. P. 324.

143 Md. 570, reversed.

ERROR to a judgment of the Court of Appeals of Maryland which affirmed a judgment dismissing a bill for an injunction.

Mr. William L. Rawls and *Mr. George Weems Williams* for plaintiff in error.

The proprietary interest of the State of Maryland in its highways gives it no power to prohibit their use for the purpose of transporting goods for hire in interstate commerce, where the vehicles employed are such as are freely permitted by the State to be used upon its highways.

The fact that Congress has enacted no legislation affecting or regulating interstate motor transportation does not leave the States free to prohibit such transportation.

By virtue of the commerce clause of the federal Constitution, the right to engage in interstate commerce cannot be denied by any State, and the question as to whether or not the public interest will be promoted by any limitation upon this right is one exclusively for the determination of Congress. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Pensacola Tel. Co.* v. *Western Union Co.,* 96 U. S. 9; *Poole* v. *Electric Ry. Co.,* 88 Md. 533; *Peddicord* v. *R. Co.,* 34 Md. 463; *Adams Express Co.* v. *New York,* 232 U. S. 14.

That § 4 of the Act of 1922, was intended to deal with this right to engage in interstate business, and was not concerned with the safety of the public upon the highways, appears not only from the language of the section, but is also clear from the fact that other sections of the article of the Code of Maryland, to which this act was an amendment, namely, Article 36, §§ 133–200, made elaborate and detailed provisions respecting the "rules of the road" and the operation of automobiles thereon.

The only aspect of public safety within the purview of the act, as construed by the Maryland Court of Appeals, is the reduction of the number of motor trucks upon the

highways resulting from the elimination of the trucks of any common carrier whose use are not essential to the needs and convenience of the public. This is but the assertion after all, of the power to determine what the needs and convenience of the public are with respect to interstate transportation, and of the right on the part of the State to exercise a power which has been delegated exclusively to Congress.

When there has been no attempt to restrict by legislation the use of the highways by the public generally, and when they are freely opened to everybody else, it is manifest that whatever may be the power of the State with respect to a carrier engaged in domestic commerce purely, it cannot under such circumstances exclude carriers engaged in interstate commerce solely upon the fragile ground that their exclusion will result in the lessening of the number of vehicles upon the road and will to that extent promote the safety of the traveling public. If common carriers in interstate commerce could be excluded on any such ground when using exactly the same vehicles which are freely permitted upon the highways, then for the same reason the State would have the power to select any other form of interstate commerce and impose the same restrictions upon it, thus giving it control over the whole field of interstate commerce in so far as the use of its highways in that connection is concerned.

It cannot escape notice that the several recent decisions of the state and lower federal courts upon this subject, (*Northern Pacific Ry. Co.* v. *Schoenfeldt,* 123 Wash. 570; *Interstate Motor Transit Co.* v. *Kuykendall,* 284 Fed. 882; *Liberty Highway Co.* v. *Michigan Public Utilities Co.,* 294 Fed. 702; *Interstate Transit Company* v. *Derr et al.,* 228 Pac. 624) in effect concede that there is no peculiar power vested in the States by reason of their mere ownership of their highways; for they all announce that the legislation of the States undertaking to regulate

interstate travel over highways is only sustainable in the absence of regulation by Congress.

The failure of Congress to enact legislation is equivalent to the declaration of freedom from any state interference. *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229.

In a long line of cases this Court has held that a State has no power whatever to require the obtaining of a license from it as a prerequisite to engaging in interstate commerce. *Adams Express Co.* v. *New York, supra; Crutcher* v. *Kentucky,* 141 U. S. 47; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1.

The right to transport goods in accustomed ways, and to use existing instrumentalities for that purpose upon complying with the conditions imposed upon the public generally, is clearly interstate commerce, national in character. Distinguishing *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23; *Port Richmond & B. P. Ferry Co.* v. *Hudson County,* 234 U. S. 317. See *Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 333.

Mr. Thomas H. Robinson, Attorney General of the State of Maryland, and *Mr. Edward H. Burke,* Assistant Attorney General, for defendants in error.

The State, at the cost of many millions of dollars to the taxpayers, has established a fine system of improved public highways, and is expending millions more in the extension, improvement and maintenance of this system. Some of the public highways over which the plaintiff in error seeks to operate its motor trucks, as instrumentalities of interstate commerce, were built by and are owned by the State, and others are the property of certain counties of the State. The State has declared that certain carriers of passengers, as well as common carriers of merchandise or freight by means of motor vehicles, shall not operate their motor trucks over streets and public highways of the State without permission granted by the Public Service Commission.

Jitney busses and taxi-cabs for the public transportation of passengers, and common carriers of freight and merchandise, are numerous, and all are operating their motor vehicles by the permission of the State. It is common knowledge that large trucks, such as the plaintiff in error proposes to use, are not only dangerous to the persons and property of other users of the road, but are destructive of the highways themselves and interfere a great deal with the convenience of travel.

If the position of the plaintiff in error be sustained, common carriers of freight or passengers by simply incorporating in an adjoining State and confining themselves to interstate commerce would escape all control of the State in matters of vital interest to the people.

The principles controlling in a case like this, where Congress has taken no action with respect to the interstate transportation involved, are stated in *Minnesota Rate Cases,* 230 U. S. 352.

By reason of difference in the character, construction, width and location of roads and the strength of bridges in the various States, it appears doubtful if any general system or uniformity of regulation could be adopted, and as the matter admits of such "diversity of treatment according to the special requirements of local conditions," it has been left with the States until Congress sees fit to act. *Hendrick* v. *Maryland,* 235 U. S. 610, and *Kane* v. *State,* 242 U. S. 160, support our contention.

That there is a necessity for regulation is evidenced by the fact that no less than thirty-one States of the Union have enacted statutes on the subject.

The question, therefore, narrows itself into one of reasonableness *vel non* of the Maryland statute.

The right asserted by the plaintiff in error is not the right of travel over the highway in the customary and ordinary way, but the privilege of making the highway itself a place of business. It is this special and extraor-

dinary use of the highway that the statute is designed to regulate. In *ex parte Dickey,* 76 W. Va. 576; *Schoenfeld* v. *Seattle,* 265 Fed. 726; *Nolen* v. *Riechman,* 225 Fed. 812; *State* v. *Darazza,* (Conn.) 118 Atl. 81; *Gizzarelli* v. *Presbrey,* (R. I.) 117 Atl. 359.

The Maryland Act, recognizing that "the movement of motor vehicles over the highways is attended by constant and serious danger to the public, and is also abnormally destructive of the ways themselves", was designed, as found by the Court of Appeals, "to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require."

The public for whose protection the Maryland statute was passed are all those who use the highways in the exercise of the right to travel over them which is common to all and which is freely accorded to all alike by the State, whether engaged in intrastate or interstate commerce. The Act, therefore, in so far as it assures and protects the common and ordinary right of citizens of other States in the use of the highways, so far from unreasonably restricting and forbidding interstate commerce, is in aid of such commerce. The width of the road, the character of its construction, the strength of the bridges, the amount of ordinary and customary travel on the road, the special and extraordinary uses to which it may have already been subjected, are all circumstances to be taken into consideration in determining whether or not an additional burden upon the road by way of a freight motor bus line is "prejudicial to the welfare and convenience of the public."

There must be some limitation upon such rights as are asserted by the plaintiff in error in this case. To make

the exercise of such rights depend upon the welfare and convenience of the public and to restrict or deny them if their exercise be prejudicial to such welfare and convenience, is both reasonable and necessary. *Crutcher* v. *Kentucky,* 141 U. S. 47, and *Adams Express Co.* v. *New York,* 232 U. S. 14, distinguished.

Neither by the Act of 1922 nor by the order of the Commission complained of is it required that the plaintiff in error shall obtain a permit from the Commission as a condition of carrying on interstate commerce. Neither the Act nor the order imposes any direct or indirect burden or restriction upon the plaintiff's right to engage in interstate commerce.

The only effect of the order is that it cannot operate its trucks over the highways of the State as it has done and proposes to continue to do. Neither the Act nor the order is a commercial regulation.

Mr. Justice Brandeis delivered the opinion of the Court.

A statute of Maryland prohibits common carriers of merchandise or freight by motor vehicle from using the public highways over specified routes without a permit. The Public Service Commission is charged with the duty to "investigate the expediency of granting said permit" when applied for; and it is authorized to refuse the same if it "deems the granting of such permit prejudicial to the welfare and convenience of the public." Laws of Maryland, 1922, c. 401, § 4.

George W. Bush & Sons Co. applied for a permit to do an exclusively interstate business as a common carrier of freight over specified routes, alleging its willingness and intention to comply with all applicable regulations concerning the operation of motor vehicles. After due hearing the permit was denied. This suit was brought in a court of the State to restrain the state officials from inter-

fering with such use of the company's trucks. The bill alleged, and it was admitted by demurrer, that the highways were not unduly congested; that they are so constructed that they can carry burdens heavier than that which would be imposed by plaintiff's trucks; that the operation of its trucks would impose no different burden upon the highways than the operation of the trucks of the same kind and character by private persons, which was freely permitted; and that, in refusing the permit, the Commission had considered merely "whether or not existing lines of transportation would be benefited or prejudiced and in this way the public interest affected." The plaintiff claimed that, regardless of permit, it was entitled to use the highways as a common carrier in exclusively interstate commerce. The trial court dismissed the bill. Its decree was affirmed by the highest court of the State. 143 Md. 570. The case is here on writ of error under § 237 of the Judicial Code.

This case presents two features which were not present in *Buck v. Kuykendall, ante,* p. 307, decided this day. The first is that the highways here in question were not constructed or improved with federal aid. This difference does not prevent the application of the rule declared in the *Buck Case.* The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission, not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The state action in the *Buck Case* was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of

Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation.

Reversed.

The separate opinion of MR. JUSTICE McREYNOLDS, delivered in this case and the one immediately preceding it, *ante,* p. 307.

I am of opinion that the courts below reached correct conclusions in these causes.

The States have spent enormous sums in constructing roads and must continue to maintain and protect them at great cost if they are to remain fit for travel.

The problems arising out of the sudden increase of motor vehicles present extraordinary difficulties. As yet nobody definitely knows what should be done. Manifestly, the exigency cannot be met through uniform rules laid down by Congress.

Interstate commerce has been greatly aided—amazingly facilitated, indeed—through legislation and expenditures by the States. The challenged statutes do not discriminate against such commerce, do not seriously impede it, and indicate an honest purpose to promote the best interests of all by preventing unnecessary destruction and keeping the ways fit for maximum service.

The Federal Government has not and cannot undertake precise regulations. Control by the States must continue, otherwise chaotic conditions will quickly develop. The problems are essentially local, and should be left with the local authorities unless and until something is done which really tends to obstruct the free flow of commercial intercourse.

The situation is similar to the one growing out of the necessity for harbor regulations. State statutes concerning pilotage, for example, have been upheld although they

amounted to regulation of interstate and foreign commerce. "They fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject." *Olsen* v. *Smith*, 195 U. S. 332, 341.

SMYTH ET AL. *v.* ASPHALT BELT RAILWAY COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, PURSUANT TO THE ACT OF CONGRESS OF SEPTEMBER 14, 1922.

No. 206. Argued January 20, 1925.—Decided March 2, 1925.

1. The propriety of a transfer of a case from the Circuit Court of Appeals will be inquired into by this Court of its own motion. P. 327.
2. A decree of the District Court dismissing a bill "for lack of jurisdiction" but in the absence of any challenge of the court's jurisdiction as a federal court, and based upon a conclusion, after full hearing upon pleadings and evidence, that the acts sought to be enjoined were not violative of rights claimed by the plaintiff under a federal statute,—*held*, not to involve the jurisdiction of the District Court as a federal court, and not appealable directly to this Court, but to the Circuit Court of Appeals. P. 328.
3. When the District Court lacks jurisdiction as a federal court it is without power to impose costs on the plaintiff. P. 330.

292 Fed. 876, returned to the Circuit Court of Appeals.

APPEAL from a decree of the District Court which dismissed a bill by which the appellants sought to enjoin condemnation of their land for railway purposes. The case was transferred to this Court by the Circuit Court of Appeals, to which the appeal was taken. It is now returned to that court.

Mr. Robert H. Kelly, with whom *Mr. T. W. Gregory* and *Mr. Frank Andrews* were on the brief, for appellants.

Mr. Mason Williams and *Mr. J. D. Wheeler,* with whom *Mr. R. J. Boyle* and *Mr. G. W. Wharton* were on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

This is an appeal from a decree of the federal court for western Texas which dismissed a bill in equity with costs. There was a full hearing upon pleadings and evidence. The plaintiffs had moved for an interlocutory injunction; the defendants to dismiss the bill. 292 Fed. 876. The decree recited, as the ground for dismissal, " that the court is without jurisdiction." The plaintiff took an appeal to the Circuit Court of Appeals, assigning fifteen errors, of which only a few referred in any way to jurisdiction. The appellate court was of opinion that, under the rule declared in *United States* v. *Jahn,* 155 U. S. 109, it was without jurisdiction, because the jurisdiction of the District Court had been challenged and the decision there was in favor of the defendants. The Court of Appeals, therefore, transferred the case to this Court, pursuant to the Act of September 14, 1922, c. 305, 42 Stat. 837. See *McMillan Contracting Co.* v. *Abernathy,* 263 U. S. 438. Whether the transfer should have been made is the preliminary question requiring decision, although not raised by counsel. *Smith* v. *Apple,* 264 U. S. 274, 275.

If the jurisdiction of the District Court as a federal court was the question there in issue, and was the only question, it is clear that, under § 238, this Court alone had jurisdiction of the appeal, *Chappell* v. *United States,* 160 U. S. 499, 508; *The Carlo Poma,* 255 U. S. 219, and it was proper to transfer the case, *Hoffman* v. *McClelland,* 264 U. S. 552. But if the question, called one of juris-

diction by the lower courts, was not, in fact, a question of the jurisdiction of the federal court as such, but whether the action complained of violated a federal law, *Louie* v. *United States,* 254 U. S. 548; *Binderup* v. *Pathe Exchange, Inc.,* 263 U. S. 291, 304–308, or whether a power possessed by the court should be exercised, *Smith* v. *Apple,* 264 U. S. 274; *Oliver American Trading Co., Inc.* v. *Mexico,* 264 U. S. 440, then the appeal was properly taken to the Circuit Court of Appeals.

The proceedings in the District Court, including its opinion and decree, and the briefs filed in this Court, show that at no time was the jurisdiction of the trial court as a federal court questioned there; and that its jurisdiction as a federal court was clear. The suit was brought as one "arising under the Constitution and Laws of the United States" and particularly under the Act to Regulate Commerce as amended. The sum involved was alleged to exceed three thousand dollars exclusive of interest and costs. All the defendants were alleged to be citizens and residents of the district. All were duly served. All appeared generally, answered and introduced evidence. The motion to dismiss assigned the grounds therefor; and lack of jurisdiction of the court as a federal court was not one of them. Lack of merits, lack of equity, and lack of that status which alone would entitle a private individual to sue were the objections urged. Lack of jurisdiction over the subject matter was also asserted in terms, but the pleadings and the opinion of the District Court show that this expression was not intended as a challenge of the jurisdiction of the court as a federal court, but as a denial of fundamental allegations in the bill essential to a cause of action and to the relief under the federal statute invoked.

The bill alleged that the plaintiffs owned a tract of land in Texas; that the two corporate defendants, and another defendant, who was the receiver of one of them, were

purposing to construct a railroad across the land; that, to this end, they were proceeding under a statute of the State to condemn, in the name of one of these corporations, a right of way over the land; that the proposed railroad is in fact an extension of the line of the other railroad corporation which is engaged in interstate commerce; that the new line is intended to be used in interstate commerce and that, irrespective of intention, it will be required by the laws of Texas to be open to such commerce; that it cannot legally be constructed without there first having been obtained from the Interstate Commerce Commission a certificate of public convenience and necessity as provided in paragraphs 18 to 20 of § 1 of the Act to Regulate Commerce as amended by Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478; that the proposed condemnation of plaintiffs' land was undertaken without first having secured such certificate; and that this action violates plaintiffs' rights under the federal statute. The District Court said in its opinion:

"Since the plaintiffs' right to injunction rests upon provisions of an Act of Congress regulating interstate commerce, the Court would be without jurisdiction unless the facts show: (1) That the Asphalt Belt Railroad Company is owned and controlled by the San Antonio, Uvalde & Gulf Railroad Company, an interstate carrier, thus constituting it an extension and branch of the latter road, or (2) that the A. B. Company is obliged by law, and its purpose is, to carry on business as an interstate carrier.

The trial court found, on the evidence and as matter of law, that the railroad which had instituted and brought condemnation proceedings was an independent intrastate carrier; that it was not obliged to conduct an interstate business; and that, hence, its action in instituting condemnation proceedings, without first obtaining a certificate from the Interstate Commerce Commission, was

not in contravention of the federal law. It is on this ground, and this only, that the District Court declared the bill should be dismissed for lack of jurisdiction; meaning obviously that, upon the facts found, it was not warranted in enjoining the condemnation proceedings, and not that as a federal tribunal it was without power to entertain the suit and inquire into the matters alleged in the bill.

This conclusion is confirmed by the fact that the plaintiffs were ordered to pay "all costs." If the District Court had lacked jurisdiction as a federal court, it would have been without power to order the plaintiffs to pay costs. *Blacklock* v. *Small,* 127 U. S. 96; *Citizens' Bank* v. *Cannon,* 164 U. S. 319.

The cause must be

Returned to the Circuit Court of Appeals with directions to proceed.

FORT SMITH LIGHT & TRACTION COMPANY *v.* BOURLAND ET AL., CITY COMMISSIONERS OF THE CITY OF FORT SMITH, ARKANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 220. Argued January 22, 1925.—Decided March 2, 1925.

An order in effect requiring a street railway company to continue operating a part of one of its lines, though it was unremunerative and must be practically rebuilt at great expense to conform to a change of street grade, and though the railway as a whole, under existing rates, was not earning a fair return, *held* not arbitrary and not violative of the due process clause of the Fourteenth Amendment. P. 332.

160 Ark. 1, affirmed.

ERROR to a judgment of the Supreme Court of Arkansas which affirmed a judgment dismissing a bill brought by the Traction Company to set aside an order made by the

City Commissioners denying it leave to abandon a part of one of its lines. The opinion is here printed as amended by an order of April 27, 1925, which also denied a petition for rehearing.

Mr. R. M. Campbell, with whom *Mr. Joseph M. Hill* and *Mr. Henry L. Fitzhugh* were on the brief, for plaintiff in error.

Mr. Sam R. Chew, Mr. Harry P. Daily and *Mr. Geo. W. Dodd* appeared for defendants in error.

Mr. Justice Brandeis delivered the opinion of the Court.

The Fort Smith Light & Traction Company owns and operates in that city a street railway system with about 22 miles of line. Included in the system is a line extending, for a third of a mile, on Greenwood Avenue. Under the law of Arkansas, a street railway is not permitted to abandon any part of its line without leave of the city commission which exercises the powers of a public utility commission. The company applied to that board for leave to abandon the line on Greenwood Avenue because it was, and would be, unremunerative. It appeared, among other things, that the city had concluded to change the grade of Greenwood Avenue; that in accepting its franchise the company had agreed to conform to the city ordinances; that these required a street railway, in case of any change in the grade of a street, to make the grade of the tracks conform thereto; that the cost of so relaying the tracks on Greenwood Avenue was estimated at $11,000; that the allocated daily earnings of this small part of the system were $2.40, the cost of operating it $8.25; and that the total net earnings of the system in 1922 were $16,000, which amount is about 1.7 per cent. of $934,540, the estimated value of the property. The

request to abandon the Greenwood Avenue line was denied. This suit was then brought in a court of the State to set aside the order on the ground, among others, that it deprived the company of its property in violation of the due process clause of the Fourteenth Amendment. The trial court denied the relief sought. Its judgment was affirmed by the highest court of the State. 160 Ark. 1. The case is here on writ of error under § 237 of the Judicial Code.

The Greenwood Avenue line had been in operation nearly twenty years. No change in conditions had supervened which required the commission to permit the abandonment, unless it were the fact that this particular part of the system was being operated at a loss; that continued operation would involve practical rebuilding of that part of the line; that such rebuilding would entail a large expenditure; and that the system as a whole was not earning a fair return upon the value of the property used and useful in the business. The order complained of does not deal with rates. Nor does it involve the question of the reasonableness of service over a particular line. Compare *Atlantic Coast Line R. R. Co.* v. *Corporation Commission,* 206 U. S. 1, 23–27; *Railroad Commission* v. *Mobile & Ohio R. R. Co.,* 244 U. S. 388. It merely requires continued operation. We cannot say that it is inherently arbitrary. A public utility cannot, because of loss, escape obligations voluntarily assumed. *Milwaukee Electric Ry Co.* v. *Milwaukee,* 252 U. S. 100, 105. The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. *Missouri Pacific Ry. Co.* v. *Kansas,* 216 U. S. 262, 279; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242 U. S. 603, 607. Compare *Railroad Commis-*

sion v. *Eastern Texas R. R. Co.*, 264 U. S. 79, 85. This is true even where the system as a whole fails to earn a fair return upon the value of the property. So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396. But the Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit and escape from the burdens incident to its use.

Affirmed.

CANNON MANUFACTURING COMPANY *v.* CUDAHY PACKING COMPANY.

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

No. 255. Argued January 28, 1925.—Decided March 2, 1925.

1. Defendant, a Maine corporation, marketed its products in North Carolina through a subsidiary, an Alabama corporation which it completely dominated through stock ownership and otherwise, but a distinct corporate entity which did not act as the defendant's agent but bought the defendant's goods and sold them to dealers to be shipped directly from the defendant. *Held*,

(*a*) That the defendant corporation did not thereby do business in North Carolina so as to be present there and suable in the federal court. P. 334.

(*b*) That the concentration of the Alabama corporation's stock in the defendant's single ownership and the legal consequences of this under the Alabama law did not have the effect of rendering its business in North Carolina the business of the defendant for purposes of jurisdiction. P. 337.

292 Fed. 169, affirmed.

APPEAL from a judgment dismissing an action on contract for want of jurisdiction over the defendant corporation.

Mr. C. W. Tillett, Jr., with whom *Mr. E. T. Cansler* and *Mr. C. W. Tillett* were on the brief, for plaintiff in error.

Mr. J. Harry Covington, with whom *Mr. Thomas Creigh, Mr. R. B. Webster, Mr. Frank M. Shannonhouse* and *Mr. John M. Robinson* were on the brief, for defendant in error.

Mr. Justice Brandeis delivered the opinion of the Court.

Cannon Manufacturing Company, a North Carolina corporation, brought, in a court of that State, this action against Cudahy Packing Company, a Maine corporation, for breach of a contract to purchase cotton sheeting for use in packing meat. The defendant appeared specially for the purpose of filing a petition for removal to the federal court for western North Carolina; and the order of removal issued. In that court the defendant, appearing specially, moved that the summons be set aside and the action dismissed for lack of jurisdiction. The ground of the motion was that the defendant was not doing business within the State and had not been served with process. The only service made was, as the sheriff's return recites, the delivery of a copy of the "summons and complaint to Cudahy Packing Company of Alabama, agent of defendant, Frank H. Ross, to whom papers were delivered, being process agent of Cudahy Company of Alabama." The District Court, concluding upon the evidence that the defendant was not present in North Caroline, entered a final judgment dismissing the action. 292 Fed. 169. The case is here under § 238 of the Judicial Code, the question of jurisdiction having been duly certified.

The main question for decision is whether, at the time of the service of process, defendant was doing business within the State in such a manner and to such an extent

as to warrant the inference that it was present there. *Bank of America* v. *Whitney Central National Bank,* 261 U. S. 171. In order to show that it was, the plaintiff undertook to establish identity *pro hac vice* between the defendant and the Alabama corporation. The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the State; but it does not do so as defendant's agent. It buys from the defendant and sells to dealers. In fulfilment of such contracts to sell, goods packed by the defendant in Iowa are shipped direct to dealers; and from them the Alabama corporation collects the purchase price. Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other States. The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws.

The objection to the maintenance of the suit is not procedural—as where it is sought to defeat a suit against a foreign corporation on the ground that process has been served upon one not authorized to act as its agent. *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer,* 197 U. S. 407; *St. Louis Southwestern Ry. Co.* v. *Alexander,* 227 U. S. 218, 226. See *Philadelphia & Read-*

ing Ry. Co. v. *McKibben,* 243 U. S. 264. The obstacle insisted upon is that the court lacked jurisdiction because the defendant, a foreign corporation, was not within the State. No question of the constitutional powers of the State, or of the federal Government, is directly presented. The claim that jurisdiction exists is not rested upon the provisions of any state statute or upon any local practice dealing with the subject. The resistance to the assumption of jurisdiction is not urged on the ground that to subject the defendant to suit in North Carolina would be an illegal interference with interstate commerce. Compare *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 587–9. The question is simply whether the corporate separation carefully maintained must be ignored in determining the existence of jurisdiction.

The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. *Bank of America* v. *Whitney Central National Bank,* 261 U. S. 171. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare *Lumiere* v. *Mae Edna Wilder, Inc.,* 261 U. S. 174, 177–8. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley* v. *Mathieson Alkali Works,* 190 U. S. 406, 409–11; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.,* 205 U. S. 364; and *People's Tobacco Co., Ltd.* v. *American Tobacco Co.,* 246 U. S. 79, 87. In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary

more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction. There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. Hence, cases concerning substantive rights, like *Hart Steel Company* v. *Railroad Supply Co.*, 244 U. S. 294; *Chicago, etc. Ry. Co.* v. *Minneapolis Civic Association*, 247 U. S. 490; *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71; and *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255, have no application.

The plaintiff contends, on a further ground, that the defendant was present in North Carolina. The argument is that there is no such thing as a corporation sole under the laws of Alabama; that three stockholders are necessary in order to sustain the existence of a corporate entity; that where the number of members falls below three the entity falls into a state of suspense; that the defendant, in fact, owned all the stock in the Alabama corporation; that the directors of the latter could not have been *bona fide* directors because not stockholders; that its franchise was suspended, *First National Bank of Gadsden* v. *Winchester*, 119 Ala. 168; and that therefore what was done in North Carolina must have been done by the defendant. No Alabama case has been cited, or found, which determines the effect, in that State, of such alleged suspense. Nor has any case been cited, or found, which determines what would be its effect under the law of North Carolina. It is not contended that the Alabama corporation was dissolved *ipso facto* by this concentration of its stock—or that its property became, in law, that of the defendant. It may be that upon the concentration of its stock in the hands of the defendant, the franchise of the Alabama corporation became subject to

forfeiture in a judicial proceeding by the State; or that thereby its status was reduced from a corporation *de jure* to one *de facto*. But whatever might be other legal consequences of the concentration, we cannot say that for purposes of jurisdiction, the business of the Alabama corporation in North Carolina became the business of the defendant.

Affirmed.

MERRITT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 159. Argued January 5, 1925.—Decided March 2, 1925.

1. Action by a sub-contractor in the Court of Claims, *held* not maintainable under the Dent Act, §§ 1 and 4, the petition not showing an agreement with the plaintiff entered into by or under authority of the Secretary of War, or performed, etc., prior to November 12, 1918, or a claim presented before June 30, 1919, or that, before a payment was made by the Government to the prime contractor, the plaintiff had made expenditures, etc., "with the knowledge or approval of any agent of the Secretary of War duly authorized thereunto." P. 340.
2. Where a contractor, upon settling with the Government under the Dent Act, induced the claimant to release his sub-contract for less than was due him by fraudulently misrepresenting to him the basis upon which the settlement was made, and the Government, learning this, exacted a repayment to itself from the contractor of of an amount equal to that of which the claimant had thus been defrauded, but it did not appear that the exaction was for the claimant's benefit, *held*, that the claimant had no cause of action to recover this amount from the United States under the Tucker Act, since the United States was under no express contract to pay the claimant and none was to be implied in fact. P. 340.
3. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Id.*
4. The practice of the Court of Claims does not allow a general statement of claim in analogy to the common counts, but requires

a plain, concise statement of the facts relied on, not leaving the defendant in doubt as to what must be met. P. 341.

58 Ct. Clms. 371 affirmed.

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

Mr. L. B. Perkins for appellant, submitted. *Mr. L. A. Widmayer* was also on the briefs.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett* and *Mr. Roscoe R. Koch,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In July, 1918, or earlier, the United States contracted with the Panama Knitting Mills for a quantity of khaki at $3.20 a yard. In June, 1919, this contract was cancelled by a new agreement between the Government and the Mills, made pursuant to the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. Under the cancellation agreement the Government adjusted its liability by accepting delivery of half of the khaki originally contracted for, paying the contract rate together with the carrying charges. The Mills had a sub-contract with the plaintiff for the supply of the khaki. By falsely representing that the Government compelled settlement on the basis of $2.50 a yard plus the carrying charges, the Mills induced the plaintiff to release it, on that basis, from the sub-contract. When the Government learned of the fraud thus perpetrated, it exacted from the Mills a repayment of $5,210.02—the difference between the amount actually paid by the Government and what would have been paid if settlement had been made on the basis of $2.50 a yard.

This suit was brought in March, 1923, to recover from the United States the sum so repaid. The Court of Claims dismissed the petition on demurrer for failure to state a cause of action. The case is here on appeal under § 242 of the Judicial Code.

Plaintiff cannot recover under the Dent Act. There are three obstacles. It does not appear, as required by § 1, that, prior to November 12, 1918, an agreement with the plaintiff, express or implied, was entered into by the Secretary of War, or "by any officer or agent acting under his authority, direction, or instruction, or that of the President." *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 385; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592. It does not appear, as required by § 1, that any such agreement had been "performed . . , or expenditures . . made or obligations incurred upon the faith of the same . . prior to" November 12, 1918. *Price Fire & Water Proofing Co.* v. *United States,* 261 U. S. 179, 183. It does not appear, as required by § 1, that the claim sued on was presented before June 30, 1919. The Dent Act affords relief although there is no agreement "executed in the manner prescribed by law," but only under the conditions stated. The plaintiff is not helped by § 4 which deals with sub-contracts; among other reasons, because it does not appear, as therein prescribed, that, before the payment made by the Government to the prime contractor, the plaintiff had "made expenditures, incurred obligations, rendered service, or furnished material, equipment, or supplies to such prime contractor, with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto."

Plaintiff cannot recover under the Tucker Act, Judicial Code, § 145, 24 Stat. 505. The petition does not allege any contract, express or implied in fact, by the Government with the plaintiff to pay the latter for the khaki on

any basis. Nor does it set forth facts from which such a contract will be implied. The pleader may have intended to sue for money had and received. But no facts are alleged which afford any basis for a claim that the repayment made by the Mills was exacted by the Government for the benefit of the plaintiff. The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581. For aught that appears repayment was compelled solely for the benefit of the Government, under the proviso in § 1 of the Dent Act, which authorizes recovery of money paid under a settlement, if it has been defrauded.

The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to the common counts. It requires a plain, concise statement of the facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling* v. *United States,* 23 Ct. Clms. 361; *The Atlantic Works* v. *United States,* 46 Ct. Clms. 57, 61; *New Jersey Foundry & Machine Co.* v. *United States,* 49 Ct. Clms. 235; *United States* v. *Stratton,* 88 Fed. 54, 59.

Affirmed.

MITCHELL ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 176. Argued January 15, 1925.—Decided March 2, 1925.

1. The Act of October 6, 1917, c. 79, 40 Stat. 345, to increase facilities for testing ordnance materials, appropriated money to pay for buildings, land, etc., " and damages and losses to persons . . . resulting from the procurement of the land," and provided that, if land and improvements could not be procured by purchase, the

President was authorized to take them over, with all appurtenant rights, and the United States should make just compensation therefor, to be determined by the President; and that if the amount so determined were unsatisfactory to the person entitled, he should be paid 75% of it and be entitled to sue the United States under Jud. Code, §§ 24 and 145, to recover such further sum as added to the 75% would make up just compensation. *Held*:— That persons whose land was taken and who accepted the compensation fixed by the President, were not thereby precluded from claiming additional compensation under the Fifth Amendment, as for a taking of their business, or from claiming damages under the Act itself for the loss of the business. P. 344.

2. It is a settled rule that damages resulting from a loss or destruction of business incidental to a taking of land are not recoverable as part of the compensation for the land taken. *Id.*
3. By its reference to "losses . . . resulting from procurement of land" the above Act doubtless authorized the Secretary of War to consider losses resulting from destruction of business when procuring land by agreement, but it is not to be construed as a departure from the settled policy of Congress to limit compensation for a taking of land to interests in the land taken. P. 345.

58 Ct. Clms. 443; affirmed.

APPEAL from a judgment of the Court of Claims rejecting, after full hearing, a claim for compensation for destruction of appellants' business resulting from the taking of their land and other land in the vicinity.

Mr. Horace S. Whitman and *Mr. William L. Marbury*, with whom *Mr. Robert H. Archer* and *Mr. Robert H. Archer Jr.* were on the brief, for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Randolph S. Collins* were on the brief, for the United States.

Mr. JUSTICE BRANDEIS delivered the opinion of the Court.

Pursuant to the Act of October 6, 1917, c. 79, 40 Stat. 345, 352, the President declared that the large tract of

land in Maryland now known as the Aberdeen Proving Ground was needed for that military purpose. Proclamations, October 16, 1917 and December 14, 1917, 40 Stat. 1707, 1731. The land was thereafter acquired under that Act from the several owners either by purchase or by eminent domain. Among the parcels acquired by eminent domain was one of 440 acres belonging to the plaintiffs and used by them in the business of growing and canning corn of a special grade and quality. The establishment of the proving ground resulted in withdrawing from such use the available lands especially adapted to the growing of this particular quality of corn. Plaintiffs were consequently unable to reëstablish themselves elsewhere in their former business. For their land, appurtenances and improvements, the President fixed $76,000 as just compensation. For the business, he made no allowance. The sum awarded was accepted without protest. In 1921 this suit was brought to recover $100,000 as compensation for the loss of their business. The Court of Claims, after a hearing upon the evidence, entered judgment for the defendant. 58 Ct. Clms. 443. The case is here on appeal under § 242 of the Judicial Code.

The Act appropriated $7,000,000 for " increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose." It then provided that, if the land, appurtenances and improvements could not be procured by purchase, the President was authorized to take over the immediate possession and title for the United States; that just compensation to be determined by the President should be made therefor; and that if the compensation so determined should prove unsatisfactory to the person entitled to receive it, he was to be paid seventy-five per cent. of that amount and was to be entitled to sue for whatever

further sum was required for just compensation. Plaintiffs make two contentions. The first is that, because the business was destroyed, they can recover, under the Fifth Amendment, as for a taking of the business upon a promise implied in fact, under the doctrine of *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645. The second contention is that, under the terms of the Act, they can recover damages for loss of the business although it may not have been taken. In support of each contention, they rely, among other things, upon the findings of fact that, before the passage of the Act, a representative of the War Department had given assurance publicly that compensation would be paid not only for the land taken by the Government but also for all injuries and losses sustained by any person as a result of the establishment of the proving ground; and that, both before and shortly after the passage of the Act, the Secretary of War had given somewhat similar assurances.

The mere fact that compensation for the taking of the land was fixed by the President and was accepted does not bar recovery on the present claim, whether the suit be deemed to be upon a promise implied in fact for a taking or for the recovery of statutory damages. The claim now asserted is on account of property other than that for which the Act provided that compensation should be made upon the President's determination. Acceptance of the award did not operate, under the doctrine of *United States* v. *Childs & Co.*, 12 Wall. 232, as a voluntary settlement of this claim. There are, however, other obstacles to a recovery. The Act authorized the taking only of "land and appurtenances and improvements attached thereto." And it did not declare that compensation should be made for losses resulting from the establishment of the proving ground.

The special value of land due to its adaptability for use in a particular business is an element which the owner

of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408; *New York* v. *Sage,* 239 U. S. 57, 61. Doubtless such special value of the plaintiffs' land was duly considered by the President in fixing the amount to be paid therefor. The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co.* v. *Providence,* 262 U. S. 668, 675. Compare *Sharp* v. *United States,* 191 U. S. 341; *Campbell* v. *United States,* 266 U. S. 368. No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act if the intention to take is lacking. *Tempel* v. *United States,* 248 U. S. 121. Moreover, the Act did not confer authority to take a business. In the absence of authority, even an intentional taking cannot support an action for compensation under the Tucker Act. *United States* v. *North American Co.,* 253 U. S. 330.

By including in the appropriation clause the words "losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose," Congress doubtless authorized the Secretary of War to take into consideration losses due to the destruction of the business, where he purchased land upon agreement with the owners. But it does not follow that, in the absence of an agreement, the plaintiffs can compel payment for such losses. To recover, they must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. The constitutions of some require that compensation be made for con-

sequential damages to private property resulting from public improvements. *Chicago* v. *Taylor,* 125 U. S. 161; *Richards* v. *Washington Terminal Co.,* 233 U. S. 546, 554. Others have, in authorizing specific public improvements, conferred the right to such compensation.[1] *Ettor* v. *Tacoma,* 228 U. S. 148; *Joslin Manufacturing Co.* v. *Providence,* 262 U. S. 668. Congress had, of course, the power to make like provision here. Compare *United States* v. *Realty Co.,* 163 U. S. 427. But the mere reference in the appropriation clause to losses "resulting from the procurement of the land for this purpose" does not confer such a right. The settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken. The only act called to our attention in which was conferred a right to compensation for injury to property other than an interest in the land taken is the statute involved in *United States* v. *Alexander,* 148 U. S. 186, which was passed more than forty years ago, and in which the injury provided for was a direct result of the taking. We need not consider other objections to a recovery.

Affirmed.

ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 229. Argued January 23, 1925.—Decided March 2, 1925.

1. A railroad company in a contract with the Director General of Railroads expressly accepted the covenants and obligations of the latter and the rights arising thereunder "in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights

[1] See, for example, *Earle* v. *Commonwealth,* 180 Mass. 579; *Allen* v. *Commonwealth,* 188 Mass. 59; Mass. Acts and Resolves, 1895, c. 488, § 14; 1896, c. 450; 1898, c. 551; *Matter of Board of Water Supply,* 211 N. Y. 174.

at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to," viz., the Federal Control Act, the Act of Aug. 29, 1916, c. 418, 39 Stat. 645, and the Joint Resolutions of April 6 and December 7, 1917, 40 Stat. 1, 429. *Held,* that a claim of the railroad under § 3 of the Federal Control Act for a deficit in operating income, etc., previously incurred under federal control, was settled and released by the contract, and that allegations in the company's petition denying this effect and intention were mere conclusions of law, not admitted by demurrer. P. 348.

2. Ordinarily, the defense of release, or accord and satisfaction, must be pleaded in bar; but where the fact appears either in the body of the petition or from an exhibit annexed, the defense may be availed of on demurrer. P. 350.

3. The agreement was within the authority of the Director General. *Id.*

58 Ct. Clms. 339 affirmed.

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

Mr. S. S. Ashbaugh, with whom *Mr. G. B. Webster* was on the brief, for appellant.

Mr. Sidney F. Andrews and *Mr. A. A. McLaughlin,* with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims which dismissed the petition on demurrer. The plaintiff owns a short-line railroad which it operated, but which is alleged to have been under federal control from January 1 to July 1, 1918. The suit was brought to recover, for that period, amounts representing the deficit in operating income, under maintenance of way and equipment charges, and the rental value of the property,

which are claimed under § 3 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 454. There was annexed to the petition as an exhibit the copy of a contract between the plaintiff and the Director General of Railroads, dated February 26, 1919. It deals, in the main, with the mutual relations of the parties for the period after July 1, 1918, but section 3 of the contract provides as follows:

"The Company . . . expressly accepts the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity, which it now has or hereafter can have against the United States, the President, the Director General or any agent or agency thereof by virtue of anything done or omitted, pursuant to the acts of Congress herein referred to.

"This is not intended to affect any claim said Company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act."

The acts of Congress referred to in the contract were the Federal Control Act, the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, and the Joint Resolutions of April 6, 1917, and December 7, 1917, 40 Stat. 1, 429. The Government assigned as a ground of demurrer that the copy of the contract annexed to the petition showed that the claims sued on had been settled and that the United States had been released from any liability to the plaintiff.

The petition alleges, among other things, "that section 3 thereof does not contain and was not intended to contain any receipt or acknowledgment of any consideration by or in favor of the plaintiff for the use of said railroad property during said six months from January 1 to July 1, 1918;" that the section refers only to other provisions;

and that the " plaintiff gained nothing by the execution of this contract, and by it no rights were lost." The contention is that these allegations are admitted by the demurrer; and that for this and other reasons section 3 can not properly be construed to apply to claims of the character of those sought to be recovered, because these " did not arise out of the contract or because of anything contained in it." The allegations in the petition as to the meaning, application and effect of section 3, being conclusions of law, are not admitted by the demurrer. *United States* v. *Ames,* 99 U. S. 35, 45; *Chicot County* v. *Sherwood,* 148 U. S. 529, 536; *Equitable Life Assurance Society* v. *Brown,* 213 U. S. 25, 43. The legal effect of the instrument remains that which its language imports. *Interstate Land Co.* v. *Maxwell Land Grant Co.,* 139 U. S. 569, 578. The contract here in question appears to have been carefully drawn. It is the standard form short-line or co-operative contract said to have been executed by more than a hundred railroads.[1] The language employed in section 3 to embody the agreement for settlement and release of claims is so clear and comprehensive as to leave on its face no room for construction. *United States* v. *Wm. Cramp & Sons Co.,* 206 U. S. 118, 128. And we do not find in any other part of the contract any provision which prevents the application of the release clause to the claims here in suit.

There is no contention that the contract as written does not express the actual agreement, nor a prayer that, because of mutual mistake, it should be reformed. The petition contains allegations which indicate that originally it was intended to challenge the validity of the contract because of duress, lack of consideration, and want of power in the Director General to enter into the same.

[1] For the form of the cooperative contract, see United States Railroad Administration, Director General of Railroads, Bulletin No. 4 (revised), 1919, p. 80; Report of the Director General, 1924, pp. 36–38.

But the plaintiff's brief declares that the sole question before the Court is whether section 3 of the contract is a settlement or waiver of the claim in suit. And more specifically: "It is not alleged nor now claimed that the contract was wholly and absolutely void because of total lack of consideration, or because the same was executed under forceable and legal duress." Any claim based on a lack of authority in the Director General is clearly unfounded.

There is in the brief a suggestion that the lower court erred in giving effect to section 3 because "the contract was set out as an exhibit to the petition not as a part thereof, but merely for the purpose of showing to the court that the cause of action set out in the petition . . . [was] entirely independent of and arose outside of the contract itself." The suggestion is unsubstantial. Ordinarily the defense of release or accord and satisfaction must be pleaded in bar. But where the fact appears either in the body of the petition, or from an exhibit annexed, the defense may be availed of on demurrer. Compare *Randall* v. *Howard,* 2 Black, 585, 589; *McClure* v. *Township of Oxford,* 94 U. S. 429, 433; *Speidel* v. *Henrici,* 120 U. S. 377, 387.

Affirmed.

CAIRO, TRUMAN & SOUTHERN RAILROAD COMPANY *v.* UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 230. Argued January 23, 1925.—Decided March 2, 1925.

1. An agreement between a railroad company and the Director General of Railroads for settlement and release of claims like the agreement in *St. Louis, etc. R. R. Co.* v. *United States, ante,* 346, considered and *held* within the authority of the Director General; and binding on the railroad, even if without consideration, it being under seal, and operative on the claim in question. P. 351.
2. Allegations *held* not sufficient to charge duress. P. 352.

58 Ct. Clms. 336 affirmed.

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

Mr. S. S. Ashbaugh, with whom *Mr. G. B. Webster* was on the brief, for appellant.

Mr. A. A. McLaughlin, with whom *Mr. Solicitor General Beck* and *Mr. Sidney F. Andrews* were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal from the judgment of the Court of Claims which dismissed the petition on demurrer. Plaintiff's claim is in character the same as that sued on in *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States,* decided this day, *ante,* p. 346. It is presented in the same manner; and the Government makes the same defense. The provision for settlement and release of claims here relied upon is substantially the same as in that case. But, in other respects, the contract is entirely different. It is in the form, known as the *per diem* contract, which contains no operative provision other than that providing for settlement and release of claims. The rest of the document consists of recitals and the testimonium clause. The consideration for the settlement and release is therein stated to be "obtaining the advantages of the two days' free time or reclaim allowance and such other co-operation as is accorded to it by the Director General of Railroads."

The petition alleges that the Director General gave no more than he would have been obliged by law to give had no agreement been made. This is not true. But it is, in any event, without legal significance. The plaintiff's agreement embodying the release was under seal. Hence, it is binding even if without a consideration. The petition alleges, also, that the agreement "was accepted by the

officers of the plaintiff for the purpose of saving for themselves such rights, privileges, and conveniences as were indicated by the Director General, and was signed for this purpose only and not otherwise, and for the supposed concessions set out in the contract itself." The allegation does not charge facts constituting legal duress. *United States* v. *Child & Co.*, 12 Wall. 232, 244. Nor is it claimed that the agreement is void because of duress.

As in the *St. Louis Company case,* the Director General clearly had authority to enter into the agreement in question.

Affirmed.

GRAYSON ET AL. *v.* HARRIS ET AL.

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

No. 187. Argued January 16, 1925.—Decided March 2, 1925.

1. Judgment held reviewable by certiorari and not by writ of error. P. 353.
2. Paragraph 6 of the Supplemental Creek Agreement, confirmed by Act of June 30, 1902, c. 1323, 32 Stat. 500, declares that descent and distribution of land and money provided by Act of March 1, 1901, c. 676, 31 Stat. 861, shall be in accordance with c. 49 of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory, but contains provisos, (*a*) that only citizens of the Creek Nation and their Creek descendants shall inherit lands of the Creek Nation, but (*b*) that, if there be no person of Creek citizenship to take descent, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49. *Held,*

That the preferred right of Creek citizens to inherit Creek allotted lands applies not only to inheritance immediately from the original allottee but also in subsequent stages of devolution, so that where an allotment made originally in the names of deceased Creek freedmen was inherited from them by an heir who was a Creek citizen, upon her death it descended to her more remote kindred, who were Creek citizens, in preference to her next of kin who was neither a Creek citizen nor a descendant of a Creek citizen. P. 355.

3. Where the state court decided as a pure matter of fact that plaintiffs were Creek citizens, but by error of law denied them their resultant federal right to preference in inheritance of Creek lands, *held*, that the finding of fact was not so related to the denial of federal right as to be reëxaminable in this Court. P. 357.
4. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this Court will not take jurisdiction to determine the federal question, has no application where the non-federal ground might have been considered by the state court, but was not. P. 358.

90 Okla. 147 reversed.

ERROR and certiorari to a decree of the Supreme Court of Oklahoma which reversed a decree in favor of Grayson et al. in their suit to recover an interest in a Creek Indian allotment and for an accounting for oil and gas extracted from it.

Mr. Robert M. Rainey, with whom *Messrs. Streeter B. Flynn, William Neff, Lewis E. Neff, Jess W. Watts* and *Charles G. Watts*, were on the briefs for petitioners.

Mr. Robert F. Blair, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought in a state court of Oklahoma to determine title to an undivided half interest in certain lands in that state lying within the former Creek Nation. The case is here both on error and certiorari. 263 U. S. 696. The latter is the appropriate remedy, and the writ of error will be dismissed.

Defendants in error claim title through one Cloria Grayson, and it is admitted that they acquired by mesne conveyances, and have, whatever title she had. The lands were originally allotted in the names of two freedmen, citizens of the Creek Nation, who had died prior to the allotment, leaving Gertrude Grayson and another as

their only Creek heirs at law; and ownership of an undivided half interest in the lands passed to each of them. Gertrude Grayson died intestate and without issue in 1907, leaving as her next of kin her maternal grandmother, Cloria Grayson, who was not a Creek citizen nor a descendant of a Creek citizen, and these plaintiffs in error, remote kindred in various degrees, all of whom were Creek citizens. This was prior to the admission of Indian Territory and the Territory of Oklahoma as the State of Oklahoma, and by the Act of May 2, 1890, c. 182, 26 Stat. 81, 95, § 31, the general law in force in Indian Territory in respect of descents and distributions was chapter 49 of Mansfield's Digest of the Statutes of Arkansas. If this law applies, it is conceded that Cloria Grayson succeeded to the half interest of Gertrude Grayson as her sole heir at law; in which event title of defendants in error is good and plaintiffs in error have no case. The contention on behalf of plaintiffs in error, however, is that the rights of the parties are controlled by the provisos found in paragraph 6 of the supplemental Creek agreement, ratified and confirmed by the Act of June 30, 1902, c. 1323, 32 Stat. 500, 501, as follows:

"6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."

In addition to claim of title, defendants in error denied that plaintiffs in error were Creek citizens and alleged in bar adverse possession of the lands for the applicable statutory period. The trial court found for plaintiffs in error on all issues and rendered a decree in their favor. Upon appeal the state supreme court reversed the decree upon the assumption that the provisos in paragraph 6 related only to the devolution of the allotment from the allottee—that is, the first succession—and that, since Gertrude Grayson was not the allottee but inherited her half interest by operation of law, the provisos had no application. 90 Okla. 147. The effect of this ruling was to read into the provisos a limitation which plainly is not there, apparently induced by the belief that a literal interpretation would lead to absurd and unwise results.

The conclusion is not in accord with the prior views of this court, to which the state supreme court gave no consideration. In *Washington* v. *Miller,* 235 U. S. 422, it was held that the proviso, that only citizens of the Creek Nation and their Creek descendants should " inherit lands of the Creek Nation," looked to the future as well as to the present. The theory had been advanced that lands which had passed into private ownership were no longer lands of the tribe (that is to say, no longer " lands of the Creek Nation ") and, therefore, not within the words of the proviso. Answering that theory this court said (p. 427): " We think the words indicated were merely descriptive of the body of lands which were being allotted in severalty and subjected to the incidents of individual ownership, that is, the lands in the Creek Nation. In that sense they would include the lands as well after allotment as before. The section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe rules of descent applicable to all Creek allotments. Nothing in the provisos indicates that they were to be less comprehensive. Their purpose was to

give Creek citizens and their Creek descendants a preferred right to inherit, and no reason is perceived for giving such a preference where a citizen entitled to an allotment died before receiving it that would not be equally applicable if he had died after it was received." In the present case stress is laid by defendants in error upon the use of the word " allotments " in the phrase " to prescribe rules of descent applicable to all Creek allotments," and it is insisted that the court meant thereby to limit the operation of the proviso to lands in their descent from the allottee and not thereafter. The word was not used in that restricted sense, but in the broader sense which includes all Creek lands which had gone through the process of allotment.

The purpose and policy of the provisos rest upon tribal rather than family sentiment, a sentiment which put the interests of the tribe above those of the family, and regarded the claims which spring from tribal membership rather than those arising from close degrees of kinship. This view is expressed in the later case of *Campbell* v. *Wadsworth,* 248 U. S. 169, 175, dealing with the Seminole agreement of 1899. Under the provision in that agreement, that if any member of the tribe die after enrollment the lands, etc., to which he would be entitled if living " shall descend to his heirs who are Seminole citizens," it was held that the lands of an Indian, enrolled as a Seminole, did not descend to his wife and daughters, enrolled only as Creeks. Answering the position of the state supreme court that only " the most powerful and impelling reasons " could induce it to hold that the Indians intended to exclude their own children from sharing in their property after death, this court said: " While it is true that it seems unnatural for the Indians to have preferred more distant relatives to their own children in providing for the descent and distribution of their property, yet from the terms of the act before us, and also

from the provisions of the Supplemental Creek Agreement that 'only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation' (32 Stat. 500), it is clear that with the Indians the interests of the tribe were paramount to those of the family and it was with a knowledge of the mode of life of their primitive people, better and more intimate than the courts can now command, that they determined that this paramount purpose would best be served by giving to children born of mixed marriages the tribal status of their mother."

The lands of the Creek Nation were tribal lands and the evident purpose of the Indians was to continue at least a semblance of that status so far as it could be done consistently with their distribution in severalty. With the wisdom of that purpose we have nothing to do. It is enough that Congress respected it and gave to it the sanction of law.

On behalf of defendants in error, it is asserted: (1) that there was an entire absence of proof that plaintiffs in error are citizens of the Creek Nation, and we are asked to review the record in that respect in order to determine whether there was any basis for the claim of federal right; and (2) that an examination of the record will show that the plea of the statute of limitations was fully established and, therefore, the decision of the state supreme court reasonably may be affirmed on that non-federal ground.

The point that the evidence fails to show that plaintiffs in error were Creek citizens presents a pure question of fact. The trial court found they were. The state supreme court expressly affirmed the finding, and, recognizing the existence of the federal question in the case, put its decision denying the federal right upon an erroneous view of the law. The denial was not the result of the finding of fact, nor is that finding so intermingled with the conclusion of law in respect of the federal right as to cause

it to be necessary to consider the matter of fact in order to pass upon the federal question. See *Aetna Life Ins. Co. et al.* v. *Dunken,* 266 U. S. 389; *Truax* v. *Corrigan,* 257 U. S. 312, 324–325, and cases cited; *Nor. Pac. Ry.* v. *North Dakota,* 236 U. S. 585, 593; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Kansas City So. Ry.* v. *Albers Comm. Co.,* 223 U. S. 573, 591. The effect of the finding was to establish the existence of a preliminary fact, related to the federal right only in the sense that it brought the case within the reach of the federal law relied on and called for a determination of the federal question then presented. In other words, the finding simply established a condition, not as a basis upon which to rest a decision of the question of federal right one way or the other, but upon which that question became an issue for consideration and determination. In such case, the ordinary rule applies that the decision of the state court upon a question of fact can not be made the subject of inquiry here. *Telluride Power Co.* v. *Rio Grande, etc. Ry.,* 175 U. S. 639, 645; *Illinois* v. *Economy Power Co.,* 234 U. S. 497, 523–524; *Dower* v. *Richards,* 151 U. S. 658, 668, *et seq.; Crary* v. *Devlin,* 154 U. S. 619; *Egan* v. *Hart,* 165 U. S. 188, 192; *Carpenter* v. *Williams,* 9 Wall. 785, 786.

Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not. *Rogers* v. *Hennepin County,* 240 U. S. 184, 188–189; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 608.

It is said that in an earlier opinion the state supreme court ruled in favor of defendants in error upon the two points last discussed. But that opinion, it appears, was

withdrawn and the present decision, rendered after a rehearing, is the only one open to our consideration. The decree of the state supreme court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Writ of error dismissed.
Decree reversed.

OHIO UTILITIES COMPANY *v.* PUBLIC UTILITIES COMMISSION OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 210. Argued January 20, 21, 1925.—Decided March 2, 1925.

1. In determining the reproduction value of the plant of a public utility as a basis for fixing its rates, there should be a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing it; and the amount of such allowance is a matter of estimate not dependent on proof of actual expenditures originally made to defray such charges. P. 362.
2. An order of a state commission, affirmed by the state supreme court, fixed rates for an electric company allowing a return of less than 5% upon the value of its property, this result being reached by arbitrarily refusing any allowance for preliminary organization expenses, and by arbitrarily reducing allowances for interest during the construction period, working capital, value of buildings and plant equipment, and operating expenses, below the amounts established as reasonable by the undisputed evidence before the commission, *Held* that the return was so inadequate as to result in depriving the company of property without due process of law; and that the company was not accorded the sort of judicial inquiry to which under the decisions of this Court it was entitled. P. 361.

108 Ohio St. 143, reversed.

ERROR to a judgment of the Supreme Court of Ohio which affirmed an order of the Ohio Public Utilities Commission reducing the rates chargeable by the plaintiff in error for electricity.

Mr. Timothy S. Hogan and *Mr. J. C. Martin*, for plaintiff in error.

Mr. John W. Bricker and *Mr. Burch D. Huggins*, with whom *Mr. C. C. Crabbe*, Attorney General of Ohio, and *Mr. Granville Barrere* were on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Ohio Utilities Company is engaged in supplying gas and electricity for light, heat and power to various communities in Ohio. In 1920 it filed with the Utilities Commission rate schedules for gas and electrical service in the Village of Hillsboro. The rates were protested and the commission ordered a hearing. Pending a decision, the company was allowed to collect the rates in accordance with its schedule upon condition that it would return to its customers any excess over the rates finally fixed, for the due performance of which it furnished a bond. After a hearing and rehearing, the commission reduced the electrical service rates set forth in the company's schedule, and fixed the same for residence and commercial lighting at twelve cents per kilowatt hour for the first two hundred hours per month and ten cents per kilowatt hour for all over two hundred hours, and for private garage automobile charging a minimum of one dollar per month net. As a basis for these rates, the commission found that the fair value of the physical property of the company used and useful in the furnishing of electrical service to consumers in Hillsboro was $138,521; to which allowances were added as follows: taxes during construction, $1,081; interest during construction, $1,500; to maintain an adequate stock of materials and supplies, $1,071; working capital for carrying on the electrical service in Hillsboro, $2,882;—bringing the value of the property, as of August 30, 1920, for rate making purposes, to the total sum of

$145,055. The commission further found that the reasonable operating expenses (including an allowance of $3,000 for taxes) in furnishing such electrical service for a period of one year should be $37,608, and a reasonable annual allowance for depreciation should be $7,252, (being five per centum of the value) making a total of $44,860. The commission then found that a reasonable return to the company for the period of one year would be $8,703, and estimated that the rates fixed would produce the aggregate of these two sums, namely, $53,563. Upon error to the state supreme court the order of the commission was affirmed. 108 Ohio State 143.

The order of the commission is assailed as confiscatory and, therefore, in contravention of the Fourteenth Amendment. The specific grounds of complaint in respect of the order, so far as necessary to be stated and considered, are as follows: (1) the value of the property should have been fixed at $154,655.93; (2) under the evidence, the allowance for operating expenses, including taxes, should have been at least $38,744.85; (3) the return to the company should have been on the basis of eight per cent. upon the value stated in (1), or $12,372 annually.

Property valuation. An examination of the record shows that the engineers of the commission made an itemized inventory and valuation of the company's property, based on reproduction value less depreciation, from which it appears that the aggregate fair value of the property for rate-making purposes was $154,655.93. This valuation was confirmed by the oral testimony of the engineers; it was acquiesced in by the company; and we find no substantial evidence in the record to the contrary. The commission accepted the valuation of its engineers in all respects except that it rejected or reduced the amount of the following items: preliminary organization expenses, $5,000, rejected outright; interest for one year's construction period, reduced from $4,507.98, as estimated and

recommended, to $1,500, a reduction of $3,007.98; working capital, being one-twelfth of the annual operating expenses and cost of coal for one month, reduced from $4,198.42 to $2,882, a reduction of $1,316.42. It also appears that the engineers' valuation of the buildings and plant equipment, $122,276.15, was carried into the commissioner's computation at the round sum of $122,000. The aggregate, therefore, of the rejections and reductions is $9,600.55.

The item of $5,000 seems to have been rejected upon the ground that there was no proof of actual expenditure. Reproduction value, however, is not a matter of outlay, but of estimate, and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility. In estimating what reasonably would be required for such purposes, proof of actual expenditures originally made, while it would be helpful, is not indispensable. The commission's chief engineer, explaining the appearance of the item in his report, called attention to the account system prescribed by the commission, which, among other things, provided that under the head of " organization " was included incorporation fees paid to the government and other fees and expenses incident to organizing the utility and placing it in readiness to do business, attorney's fees, cost of preparing and issuing certificates of stock, etc., etc., and testified that the item was an estimate made as the result of an investigation by the commission's engineer on the spot. There was no testimony to the contrary; and the company, in view of the concession, evidently deemed it unnecessary to produce evidence upon the point. That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested that the estimate of the engineers is excessive or unfairly made; and the rejection of the entire amount cannot be regarded as otherwise than arbitrary.

The reduction of the item for interest seems to be of like character. The engineers' estimate was based upon their conclusion that it would require one year for the construction of the plant; and interest at six per cent. was allowed on the estimated cost for half of that period. There is no justification in the record, so far as we can see, for a reduction of the item to an amount which is less than one-third of the engineers' estimate.

The item for working capital was carefully worked out by the commission's own engineers; there was no evidence to the contrary; and the reduction seems to have been equally capricious.

The curtailment of the estimated value of the buildings and plant equipment by the sum of $276.15 finds no explanation in the record, and probably was a sacrifice to the easy convenience of round numbers.

Operating expenses. The commission's engineers reported and testified that the actual operating expenses for the year ending February 28, 1921, were $38,744.85,—to which should be added the amount of a reasonable depreciation allowance, fixed by the commission itself at $7,252. We are unable to find any evidence in the record which impeaches the accuracy of the sum of these expenses, or which casts doubt upon their fairness as a measure of the necessary annual operating expenses. Yet the commission reduced the amount to $37,608, a difference of $1,136.85. The commission found, it is true, that the plant had been inefficiently operated. But we find no evidence to this effect in the record and none has been called to our attention. To the contrary, the commission's engineer who examined the property and accounts of the company testified that he considered the expenditures of the company were reasonable and that the plant was efficiently and economically managed.

Return. As bearing upon the amount of return to which the company is entitled, a summary of the fore-

going may now be considered: value of property for rate-making purposes, $154,655.93; annual amount of income based upon rates fixed by commission, $53,563; operating expenses, together with amount of annual depreciation allowed by commission, $45,996.85; leaving a balance as return to the company of $7,566.15, or less than five per cent. upon the value of the property. That this is so plainly inadequate as to result in depriving the company of its property without due process of law may not be doubted. See *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692–695, and cases cited; *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 288.

From the foregoing, it is evident that the state supreme court did not accord to the plaintiff in error that sort of judicial inquiry to which under the decisions of this court it was entitled. *Bluefield Co.* v. *Pub. Serv. Comm., supra,* p. 689; *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289.

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

LYNCH, EXECUTRIX, ETC. *v.* ALWORTH-STEPHENS COMPANY.

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

No. 273. Argued January 7, 8, 1925.—Decided March 2, 1925.

1. The interest of a corporate lessee of a mine under a lease for a term of years obliging it to mine a minimum tonnage of ore annually and to pay the lessor, owner of the fee, a stated royalty per ton mined, is property within the meaning of § 12a of the Income Tax Law of September 8, 1916, which provides that the net income of corporations organized in the United States shall be ascertained by deducting from gross income, among other things, " a reasonable allowance for the exhaustion . . . of property arising out of its use," and specifically, in the case of mines, " a reasonable allowance

for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year," etc. *United States* v. *Biwabik Mining Co.*, 247 U. S. 116; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, distinguished. P. 368.

2. As the mining goes on, the property interest of the lessee in the mine, and that of the owner, are lessened, and in both cases the extent of this exhaustion, with the consequent deduction to be made under the above statute, is arrived at by determining the aggregate amount of the depletion of the mine, based upon the market value of the product, and allocating that amount in proportion to the interests of owner and lessee, severally considered. P. 370.

294 Fed. 190, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court (278 Fed. 959) for the present respondent in its action to recover back from an internal revenue collector the amount of an income tax, paid under protest. Upon the death of the defendant, his executrix was substituted.

Mr. Solicitor General Beck and *Mr. Merrill E. Otis,* Special Assistant to the Attorney General, for petitioner.

Mr. W. D. Bailey and *Mr. Horace Andrews,* with whom *Messrs. J. L. Washburn, Oscar Mitchell* and *William P. Belden* were on the briefs, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The federal income tax return made by respondent (a corporation organized in the United States) for the year 1917 showed the sum of $10,253.21 due the government for income and excess war profits taxes for that year; and this amount was paid. Thereafter, the Commissioner of Internal Revenue assessed respondent with an additional tax of $17,128.44, which respondent was forced to pay and did pay under protest, and to recover which this

action was brought against E. J. Lynch, a collector of internal revenue, to whom the payment had been made. Lynch subsequently died and his executrix was substituted as defendant. The federal district court for the district of Minnesota, where the action was brought, rendered judgment in favor of respondent for the amount. 278 Fed. 959. The circuit court of appeals affirmed the judgment, 294 Fed. 190; and the case is here upon certiorari. 264 U. S. 577.

The facts from which the controversy arose, are not in dispute, and, for present purposes, may be shortly stated. Prior to March 1, 1913, respondent had leases upon two definitely described tracts of land in Minnesota containing deposits of iron ore, known as the Perkins mine and the Hudson mine. The leases, unless sooner terminated by the lessee in the manner therein provided, ran for a period of fifty years and obliged respondent to mine and remove at least fifty thousand tons of iron ore annually from the Perkins and twenty-five thousand tons annually from the Hudson and to pay the lessor, owner of the fee, a royalty of thirty cents per ton upon each ton of ore extracted. Respondent subleased the lands upon terms not necessary to be stated further than that the sublessee of the Perkins was to pay respondent a royalty of seventy-five cents per ton and the sublessee of the Hudson a royalty of sixty cents per ton, or forty-five cents and thirty cents, respectively, per ton more than was made payable by respondent to the lessor owner.

Before March 1, 1913, both tracts of land had been fully explored and the deposits of ore therein developed to such an extent that the entire amount of tonnage was known with substantial accuracy, and the properties were demonstrated to be of great value. On that date it was known that these ore bodies would be entirely worked out and the mines exhausted within seven years; and this in fact happened. The market value of the ore in the mines

during that entire time exceeded seventy-five cents per ton; and it sufficiently appears that during such time respondent and its sublessees were in possession of the lands engaged in mining and removing the ore therefrom. Without repeating the formula followed in arriving at the result, it is enough to say that the trial court found that, under the leases, the respondent had a property interest in these ore bodies, the fair market value of which, as of March 1, 1913, was 71.9 per cent. of the total royalties which would be received under the subleases, and such royalties constituted the sole source of respondent's income. Thereupon, the lower courts held that respondent was entitled to deduct from its gross income for 1917 a sum equal to 71.9 per cent. thereof for depletion, and that only the balance remaining was subject to income and excess profits taxes. Such taxes, properly computed, amounted to the sum returned and originally paid by respondent and no more.

The applicable law is found in §§ 2, 10 and 12 (a) of the Act of September 8, 1916, c. 463, 39 Stat. 756, 757–758, 765, 767. Section 10 imposes a tax of two per centum upon the total annual net income received from all sources by every corporation, etc., organized in the United States. Section 12 (a)[1] provides that such net

[1] Sec. 12. (a). In the case of a corporation, joint-stock company or association, or insurance company, organized in the United States, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

. . . . . .

Second. All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade; (a) in the case of oil and gas wells a reasonable allowance for actual reduction in flow and production to be ascertained not by the flush flow, but by the settled production or regular flow; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been

income shall be ascertained by deducting from the gross amount of the income, among other things, "a reasonable allowance for the exhaustion . . . of property arising out of its use . . . ; (b) in the case of mines a reasonable allowance for depletion thereof not to exceed the market value in the mine of the product thereof which has been mined and sold during the year for which the return and computation are made, . . ." Section 2 contains the following provision (p. 758): "(c) For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived."

Upon the foregoing facts and under these statutory provisions, the question presented for consideration is whether the relation of respondent to the mines which were the source of its income, was such that it was entitled to deduct from the gross amount of such income a reasonable amount for exhaustion or depletion. Upon the part of the petitioner the contention is that the leases do not convey to the lessee the ore bodies but are contracts of rental conferring only the right to use and occupy the premises and mine the ore, which, so long as it remains in the ground, is the property of the fee owner. It is, therefore, insisted that by the extraction of the ore, only the property of the fee owner is depleted and such owner alone is entitled to an allowance therefor. On the other

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mined and sold during the year for which the return and computation are made, such reasonable allowance to be made in the case of both (a) and (b) under rules and regulations to be prescribed by the Secretary of the Treasury: *Provided,* That when the allowance authorized in (a) and (b) shall equal the capital originally invested, or in case of purchase made prior to March first, nineteen hundred and thirteen, the fair market value as of that date, no further allowance shall be made; . . .

hand, respondent contends that under the leases the lessee, as well as the lessor, owns a valuable property interest in the mines and by the terms of the statute each is entitled to deduct from gross income a reasonable allowance for depletion, the lessee for exhaustion of the leasehold interest and the lessor for exhaustion of the fee interest as lessened by the interest of the lessee, such deduction to be allowed according to the value of the interest of each in the property, the entire allowance, however, not to exceed the total market value in the mine of the product thereof mined and sold during the taxable year.

It is, of course, true that the leases here under review did not convey title to the unextracted ore deposits, *United States* v. *Biwabik Mining Co.,* 247 U. S. 116, 123; but it is equally true that such leases, conferring upon the lessee the exclusive possession of the deposits and the valuable right of removing and reducing the ore to ownership, created a very real and substantial interest therein. See *Hyatt* v. *Vincennes Bank,* 113 U. S. 408, 416; *Ewert* v. *Robinson,* 289 Fed. 740, 746–750. And there can be no doubt that such an interest is property. *Hamilton* v. *Rathbone,* 175 U. S. 414, 421; *Bryant* v. *Kennett,* 113 U. S. 179, 192.

The general provision in § 12 (a), Second, is that the deduction from gross income shall include a reasonable allowance for the "exhaustion . . . of property." There is nothing to suggest that the word "property" is used in any restricted sense. In the case of mines, a specific kind of property, the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold during the year. The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, if there be any, during the taxable year results from the

plain terms of the statute, such deduction, since the property is an interest in mines, to be limited to the amount of the exhaustion of respondent's interest caused by the depletion of the mines during the taxable year. We agree with the circuit court of appeals, 294 Fed. 194, that, "The plain, clear and reasonable meaning of the statute seems to be that the reasonable allowance for depletion in case of a mine is to be made to every one whose property right and interest therein has been depleted by the extraction and disposition 'of the product thereof which has been mined and sold during the year for which the return and computation are made.' And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market

value of the product, and allocating that amount in proportion to the interest of each severally considered.

We are referred to *Weiss* v. *Mohawk Mining Co.*, 264 Fed. 502, where the circuit court of appeals for the sixth circuit reached an exactly opposite conclusion to that announced in the present case by the courts below. The opinion in that case was apparently made to rest upon the decision of this court in *United States* v. *Biwabik Mining Co., supra,* which, in turn, followed *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503. These cases, however, arose under the corporation tax law of 1909, c. 6, 36 Stat. 11, 112, § 38, imposing a special excise tax with respect to the carrying on or doing business by a corporation, etc., measured by its net income, in the ascertainment of which, among other things, there was authorized a deduction of "a reasonable allowance for depreciation of property." The *Sargent Land Co.* case concerned the owner and lessor of mining property, while the *Biwabik Mining Co.* case concerned a lessee of mining property. It was held in both cases, as we hold here, that the leases under consideration did not convey title to the ore in place. Whether the lessees had property interests such as we have determined here, was not considered. Both decisions, expressly in one and implicitly in the other, turned, primarily, upon the scope of the word "depreciation." In the *Sargent Land Co.* case this appears expressly from the following extract (pp. 524–525): "We do not think Congress intended to cover the necessary depreciation of a mine by exhaustion of the ores in determining the income to be assessed under the statute by including such exhaustion within the allowance made for depreciation. It would be a strained use of the term depreciation to say that, where ore is taken from a mine in the operation of the property, depreciation, as generally understood in business circles, follows. True, the value of the mine is lessened from the partial exhaustion of the property, and,

owing to its peculiar character, cannot be replaced. But in no accurate sense can such exhaustion of the body of the ore be deemed depreciation. It is equally true that there seems to be a hardship in taxing such receipts as income, without some deduction arising from the fact that the mining property is being continually reduced by the removal of the minerals. But such consideration will not justify this court in attributing to depreciation a sense which we do not believe Congress intended to give to it in the Act of 1909." And this view is immediately emphasized by putting in contrast with the "depreciation" of the 1909 Act, the "reasonable allowance for the exhaustion . . . of property" of the income tax provision of the Tariff Act of 1913 and the exhaustion and depletion provisions of the Act of 1916, heretofore quoted. "These provisions," the court concluded (p. 525), "were not in the Act of 1909, and, as we have said, we think that Congress, in that act, used the term 'depreciation' in its ordinary and usual significance. We therefore reach the conclusion that no allowance can be made of the character contended for as an item of depreciation."

The decision in the later case of the *Biwabik Mining Co.*, it is true, rests upon the predicate that the lessee was not a purchaser of the ore in place, but that was because the decision of the lower court—that the lease as applied to the situation there developed, was "in every substantial way *pro tanto* a purchase"—presented that question as the one to be met. The lower court thought that the case of the lessor (Sargent Land Co.) was to be distinguished from that of the lessee (Biwabik Mining Co.) upon the theory that, while the royalties paid to the former might properly be called income, the receipts of the latter resulted from the sale of capital assets and were not income. But this court rejected the assumed distinction as unsound and decided the case upon that point without referring to the question of deduction on account

of depreciation. Evidently, it was taken for granted in the lower court that under the decision in the *Sargent Land Co.* case, the latter point was no longer open; and it was passed there, as it was here, without comment. Considering the *Sargent Land Co.* and the *Biwabik Mining Co.* cases together, it is apparent that in respect of the matter of *depreciation* under the Act of 1909, in the opinion of this court, lessor and lessee stood upon the same footing, neither being entitled to an allowance; but it was plainly recognized that if the statutory allowance had been for *exhaustion* or *depletion,* as in the later acts, an entirely different question might have been presented as to both interests. We find nothing in either case out of harmony with the conclusion reached by the lower courts, in respect of the construction and application of the pertinent provisions of law which are now under review.

Affirmed.

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

BLUNDELL, EXECUTOR, ET AL. *v.* WALLACE.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 276. Argued January 29, 1925.—Decided March 2, 1925.

1. Section 23 of the Act of April 26, 1906, disposing of the affairs of the Five Civilized Tribes, which provides: "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein," was intended (save the proviso limiting full-bloods) to enable the Indian to dispose of his estate by will on the same footing as any other citizen, notwithstanding restrictions previously imposed against alienation of allotments (e. g., by Choctaw-Chickasaw Supplemental Agreement, July 1, 1902, §§ 12 and 16), leaving the regulatory local law of wills free to operate as in the case of other persons and property. P. 375.

2. Hence the will of a married half-blood Choctaw woman devising her homestead and surplus allotments is subject to the provision of the Oklahoma law (Rev. L. 1910, § 8341), forbidding any woman while married to "bequeath more than two-thirds of her property away from her husband." *Id.*

96 Okla. 26, affirmed.

ERROR to a decree of the Supreme Court of Oklahoma which affirmed a decree in favor of the plaintiff, Wallace, in his suit to quiet title to an interest in certain Choctaw Indian allotments.

Mr. Reford Bond, for plaintiffs in error, submitted.

Mr. John B. Dudley, with whom *Mr. W. L. Farmer* and *Mr. Cicero I. Murray* were on the brief, for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to quiet title to a one-third interest in homestead and surplus lands originally allotted to Patsy Poff, a half-blood Choctaw Indian woman, under the Act of July 1, 1902, c. 1362, 32 Stat. 641. She died August 7, 1916, David H. Poff, her husband, surviving. By her will made in 1912, which was duly probated, she devised the entire allotment to Juanita and Oleta Blundell, her great granddaughters, bequeathing to her husband only a nominal sum. Defendant in error asserts title through mesne conveyances vesting in him the interest of David H. Poff. His suit is based on the provisions of § 8341, Rev. Laws Okla. 1910 (§ 11224 Comp. Stats. Okla. 1921), which reads:

"Every estate and interest in real or personal property to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will: Provided, that no marriage contract in writing has been entered into between the parties; no man while married shall bequeath

more than two-thirds of his property away from his wife, *nor shall any woman while married bequeath more than two-thirds of her property away from her husband;* Provided, further, that no person who is prevented by law from alienating, conveying or encumbering real property while living shall be allowed to bequeath same by will."

Plaintiff in error contends that this statute as applied to Patsy Poff's will is in direct conflict with § 23 of the Act of Congress of April 26, 1906, disposing of the affairs of the Five Civilized Tribes, c. 1876, 34 Stat. 137, 145, and, therefore, invalid. Section 23 is as follows:

"Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided,* That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner."

There was an amendment in 1908 in a detail not important here. It was held below that the state statute applied; that there was no conflict with the federal statute; that defendant in error was entitled to recover, and the decree went accordingly. 96 Okla. 26.

A brief reference to the state of the law at the time of the passage of § 23 will help to clear the way for a correct determination of the question. By §§ 12 and 16 of the supplemental agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, *supra,* lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will, *Taylor* v. *Parker,* 235 U. S. 42; and, but for § 23, it is plain that the devise in question, at least as to the homestead, would have been without effect.

But, it must be borne in mind, the restriction was in respect of the specified lands and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first, by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma, by the substitution therefor of Oklahoma law. *Taylor* v. *Parker, supra; Jefferson* v. *Fink,* 247 U. S. 288, 294. The general policy of Congress prior to the adoption of § 23, plainly had been to consider the local law of descents and wills applicable to the persons and estates of Indians except in so far as it was otherwise provided. Thus, by § 2 of the Act of April 28, 1904, c. 1824, 33 Stat. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly "continued and extended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise," and jurisdiction was conferred upon the courts of the Territory in the settlement of the estates of decedents, etc., whether Indian, freedmen, or otherwise.

Section 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the state supreme court that Congress intended thereby to enable "the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto." The effect of § 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in *Blanset* v. *Cardin,* 256 U. S. 319, cited to the contrary, which militates against this view. That case involved the will of a Quapaw woman devising her restricted lands away from her husband. It was held that § 8341 of the Oklahoma laws did not apply because it was in conflict with an act of Congress. But the act there

considered was very different from the one now under review. There the authority to dispose of restricted property by will was limited by the provisions of the Act of February 14, 1913, c. 55, 37 Stat. 678, that the will must be "in accordance with regulations to be prescribed by the Secretary of the Interior," and that no will "shall be valid or have any force or effect unless and until it shall have been approved" by that officer. By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. But here the federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law.

Affirmed.

CITY OF NEWARK, ET AL. *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.

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

No. 351. Argued November 21, 24, 1924.—Decided March 2, 1925.

1. New Jersey, by empowering a railroad company to have as many tracks within its specified right of way as it might deem necessary, and to erect suitable bridges to accommodate them, including draw bridges over navigable waters crossed, impliedly consented that, in the maintenance and improvement of the railroad, a draw bridge over Newark Bay, originally constructed with two tracks, might be replaced by a better one accommodating four tracks upon substantially the same location. Ls. N. J. 1860, c. 64. P. 381.
2. Both state and federal governments having consented to this replacement, it is unnecessary to decide whether the acts of Congress and approval of the plans by the Chief of Engineers and Secretary of War would be sufficient without the consent of the

State, or whether the legislation of Congress supersedes the laws of the State, respecting navigable waters wholly within New Jersey. P. 384.

3. The replacement in question was not within Ls. N. J. 1914, § 4, c. 123, as amended; requiring approval by the state Board of Commerce and Navigation of plans for water front development undertaken since the passage of that act. P. 385.
4. Nor, was approval necessary by the Port of New York Authority, a body corporate and politic created by compact between New Jersey and New York with the consent of Congress. P. 386.
5. The fact that the railroad's bridge was not included in the comprehensive plan for the development of the Port of New York (embracing Newark Bay) adopted pursuant to the said compact, does not make it unlawful or deprive the company of power to construct it. *Id.*

297 Fed. 77; 287 *id.*, 196, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill brought by the City of Newark to enjoin the Railroad Company from constructing a bridge over Newark Bay. Jersey City and the State of New Jersey intervened as complainants. The Port of New York Authority, a body politic established by compact for the development of the Port of New York District, including Newark Bay, was made a defendant and answered, leaving its duties in the matter to the decision of the court. The bill was dismissed on motion of the Railroad, upon the ground that it did not state a cause of action. The two cities and the State appealed.

Mr. George W. Wickersham, with whom *Messrs. Jerome T. Congleton,* Corporation Counsel of the City of Newark; *Edward L. Katzenbach,* Attorney General of the State of New Jersey; *Thomas J. Brogan,* Corporation Counsel of the City of Jersey City, and *Paxton Blair,* were on the briefs, for appellants.

Mr. Richard V. Lindabury, with whom *Mr. Charles E. Miller* was on the brief, for the Central Railroad Company of New Jersey.

Mr. Julius Henry Cohen, for the Port of New York Authority.

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by the City of Newark to enjoin the construction of a bridge across Newark Bay. Jersey City and the State of New Jersey by leave of court intervened as parties complainant.

Under the authority of c. 64, Laws of New Jersey, 1860, the defendant company constructed and has since maintained and used a double-track wooden railroad bridge, with bascule draws, across Newark Bay. It is below Newark, between Elizabeth and Bayonne, and crosses the channel at an angle of about 66 degrees. Newark Bay is a navigable estuary, and its waters at this place are wholly within the State of New Jersey. The company proposes, and has commenced, to construct upon substantially the same location a substitute bridge of masonry and steel with four tracks and vertical draws. It claims that the acts of Congress of August 8, 1919, c. 42, 41 Stat. 277, and February 15, 1921, c. 47, 41 Stat. 1099, and the Bridge Act of March 23, 1906, c. 1130, 34 Stat. 84, with the approval of its plans by the Chief of Engineers and Secretary of War, confer authority to construct the bridge in question without the consent of the State. But the company also insists that, if the authority of the State is necessary, it was granted by the act of 1860.

Appellants maintain that the source of power to construct a bridge over navigable waters wholly within one State is in the State itself; that the concurrent consent of both state and federal governments is necessary before such a bridge lawfully may be erected; that the authority granted by the act of 1860 does not extend to the new bridge, and that under laws of New Jersey (c. 123, Laws of 1914, and c. 242, Laws of 1915) the approval of the

substitute bridge by the state Board of Commerce and Navigation is necessary.

The complaint alleges that the City of Newark owns real estate above the bridge on the westerly shore of the bay, and has expended large sums for improvements thereon, consisting of warehouses, slips, docks and other facilities of commerce, known collectively as Port Newark Terminal; that neither the present nor the proposed bridge is necessary to the operation of the railroad; that, because of the threatened construction of the proposed bridge, complainant has been unable to secure tenants for the terminal property; and that, if any bridge shall be constructed between Elizabeth and Bayonne, the free and unobstructed access of vessels to the Newark Terminal will be prevented and the value of the terminal destroyed. The complaint shows that the defendant the Port of New York Authority is a body corporate and politic, established by a compact between New Jersey and New York for the creation of the Port of New York District, and for the comprehensive development of that port. Congress gave its consent to the agreement. C. 151, Laws of New Jersey, 1921; c. 154, Laws of New York, 1921; c. 77, 42 Stat. 174. The district extends as far north as Irvington on the Hudson, New York, as far east as Long Beach, Long Island, as far south as Atlantic Highlands, and as far west as Summit, New Jersey, and so includes Newark Bay and the site of the bridge. See opinion of District Court in this case, 287 Fed. 196, 201. Pursuant to the compact, a comprehensive plan for the development of the Port of New York was approved by both States and consented to by Congress. C. 9, Laws of New Jersey, 1922; c. 43, Laws of New York, 1922; c. 277, 42 Stat. 822. Appellants insist that Congress, by creating and adopting as its instrumentality the Port Authority, qualified the license granted by the United States to the company by imposing as an additional requirement the approval of that body.

The petition of intervention of Jersey City adopts the allegations of the complaint and shows that within its territorial limits it has much shore land on Newark Bay and the Hackensack River, which is a continuation of the bay, and that it owns lands on these waterfronts, on which it has expended large sums for the construction of wharves and other improvements. The petition states that the construction of the proposed bridge will cause that city irreparable injury. The petition of intervention of the State of New Jersey calls attention to the provisions of the acts of 1914 and 1915, and alleges that the company has not obtained the approval of its plans for the proposed bridge by the Board of Commerce and Navigation.

The complainant and interveners pray judgment that the defendant company is without right or power to build the proposed bridge; that it would be an unlawful purpresture and public nuisance; and that its construction without the permission of the New Jersey Board of Commerce and Navigation and the Port Authority is unlawful, and for an injunction.

The defendant Port Authority answered. The defendant company moved to dismiss the complaint on the ground that it failed to state a cause of action. The motion was granted by the District Court (287 Fed. 196), and its decree was affirmed by the Circuit Court of Appeals. 297 Fed. 77. Complainant and interveners appealed to this court. Judicial Code, § 241.

By the legislation empowering the company to construct, maintain and use the railroad, the State of New Jersey consented to the construction of the bridge in question.

At the time the bridge was built, there was no applicable legislation by Congress. And it was within the power of the State to authorize its construction. *Willson* v. *Black-Bird Creek Marsh Company,* 2 Pet. 245, 252;

Escanaba Company v. *Chicago,* 107 U. S. 678, 683. Chapter 64, Laws of New Jersey, 1860, provides: "That it shall and may be lawful for the Central Railroad Company of New Jersey to extend their railroad from some point in their track in the city of Elizabeth, to some point or points on New York bay, in the county of Hudson, at or south of Jersey City; and for that purpose, in its construction and completion, maintenance, use and enjoyment, all and every provision of the act entitled, 'An act to incorporate the Somerville and Easton Railroad Company' [approved February 26, 1847], and of the several supplements thereto, shall extend and be applicable to the railroad now authorized to be constructed, in every respect as if the same had been originally authorized under the said act to which this is a supplement. [§1] . . . That the said railroad company shall construct a suitable bridge over any navigable water that they may cross, with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel, located at a point convenient for navigation . . ." (§2.) Section 6 of the act of incorporation of 1847 confers upon the president and directors of the company "all the rights and powers necessary and expedient to survey, lay out, and construct" the railroad "not exceeding one hundred feet in width, with as many sets of tracks and rails as they may deem necessary . . . and to erect embankments, bridges, ferries, and all other works necessary to lay rails and to do all other things which shall be suitable or necessary for the completion or repair of the said road or roads." These laws conferred on the company not only the powers expressly defined, but also those which fairly are incidental thereto. *Union Pacific Ry. Co.* v. *Chicago, &c. Ry. Co.,* 163 U. S. 564, 581. Necessary bridges are essential parts of the railroad; they are stretches of railroad over water. As to bridges over navigable waters, the act of 1860 specified draws and the num-

ber and width of openings. But it did not prescribe the number of tracks or other elements which were to constitute the railroad. The company was empowered to have as many tracks, within the width specified, as it deemed necessary. That the company in the first instance might have built a four-track bridge of permanent materials such as is now proposed, instead of the smaller wooden structure, cannot be doubted. The powers granted were not exhausted by the construction of the tracks and bridge first provided. Its charter was of unlimited duration. Bridges, as well as other elements of the property, must be replaced when they wear out or become inadequate. The company was empowered to maintain and improve its railroad, as it might from time to time find necessary or expedient. It was not bound to have its performance limited to the capacity of the bridge first constructed, but it was free to add to its transportation facilities by laying down additional tracks over waters crossed by its bridges as well as upon land. Plainly, authority to provide, as needed, better and stronger bridges having additional tracks is to be regarded as within the purposes of and incidental to the powers expressly given. See *Railway Companies* v. *Keokuk Bridge Co.,* 131 U. S. 371, 385, 389; *Brainard* v. *Clapp,* 10 Cush. (Mass.) 6, 10; *Western Union Telegraph Co.* v. *Polhemus,* 178 Fed. 904, 906. This case is not like *Morris and Essex Railroad Co.* v. *Central Railroad Co.,* 31 N. J. L. 205, or *McCran* v. *Erie Railroad Company,* 95 N. J. Eq. 653. In the former, the company, having laid out its railroad in accordance with the charter, was held to be without power to add a branch or spur. In the latter, it was held that a change of a part of the line shortening a curve could not be made without complying with § 16 of the Railroad Act of New Jersey, requiring the consent of the Riparian Commission (now the Board of Commerce and Navigation) and the payment of compensation to that body for land under water

taken by the company. Here no extension, branch, spur, or change of route is involved.

The replacement was authorized by the United States. The act of August 8, 1919 authorized the company to construct a bridge suitable to the interests of navigation, between Elizabeth and Bayonne, in accordance with the Bridge Act of March 23, 1906. The latter requires the plans and specifications to be approved by the Chief of Engineers and Secretary of War (§ 1), and provides that, whenever Congress shall authorize a bridge over navigable waters of the United States, the authority shall cease unless construction be commenced within one year and completed within three years. § 6. The company failed to commence construction within one year. But the act of February 15, 1921 made the time for commencing and completing the bridge two and five years respectively from the date of its passage. The Chief of Engineers and Secretary of War, December 29, 1922, approved the plans. The supremacy of the power of Congress to regulate commerce with foreign nations and among the States and of the regulations made by the exertion of that power is so well known as not to require citation of authority. Undoubtedly, that power extends to the navigable waters of Newark Bay and to the plans for the replacement of the bridge in question. As both state and federal governments have authorized or consented to the construction of the bridge, we need not decide whether the acts of Congress and approval of the plans by the Chief of Engineers and Secretary of War would be sufficient without the consent of the State, or whether, in respect of the navigable waters of Newark Bay wholly within the State of New Jersey, the legislation of Congress supersedes the laws of the State.

The laws of New Jersey do not require approval of the plans for the proposed bridge by the state Board of Commerce and Navigation.

Section 4, c. 123, Laws of 1914, provides: "All plans for the development of any water front upon any navigable water or stream of this State, or bounding thereon . . . in the nature of individual improvement or development, or as a part of a general plan which involves the construction, change, alteration or modification of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water front development, to be undertaken subsequent to the passage of this act, shall first be submitted to the said commission [the Board of Commerce and Navigation. §§ 5, 13, c. 242, Laws of 1915], and no such development . . . shall be commenced or executed without the approval of this commission first had and received . . ." And it declares that any such development or improvement commenced or executed without such approval shall be deemed to be a purpresture and a public nuisance. The company in February, 1917, June, 1918, and February, 1922, applied to that board for the approval of its plans for the proposed bridge. All its applications were denied. Nevertheless, the company is free to insist that such approval was not required. See *Buck* v. *Kuykendall,* 267 U. S. 307. The plans for the new bridge to replace the old one are not shown by any allegations of fact to constitute a "plan for the development of any water front." The construction or replacement of a railroad bridge across a bay or river is not necessarily a "water front development." The company was empowered under the act of 1860 not only to construct and maintain its railroad and the existing double-track bridge across the bay, but also to replace that bridge by another having additional tracks, whenever the company found it expedient so to do. We find nothing in the act to indicate an intention to require the plans for such replacement to be submitted to the state board. It is plain that the construction to be undertaken by the company for the maintenance and betterment of its rail-

road bridge over the bay is not a "water front development to be undertaken subsequent to the passage" of c. 123, Laws of 1914.

Approval by the Port Authority of the company's plans for the proposed bridge was not required. There is no provision in any of the laws relating to the Port Authority, or to the comprehensive plan for the development of the port, which requires such approval. And the Port Authority does not claim that the company was required to obtain its permission. In its answer, it prays the court "to determine its legal duties in the premises," and expresses willingness to pass on the application for a permit if the court shall determine one is required. The complaint alleges that the bridge is not included in the comprehensive plan, and that the existing and proposed bridges "are in conflict therewith, obstructive thereof, and inimical thereto." But the fact that the bridge is not included does not make it unlawful, or leave the company without authority to construct it. It does not appear that the Port Authority has attempted, or has power, to deprive the company of its right to maintain, improve and use that part of its railroad. The assertion that the bridge is in conflict with the comprehensive plan is not supported by any facts alleged in the complaint or in the answer of the Port Authority. The pleader's naked assertion is not enough to support the contention that the consent of the Port Authority was required.

Decree affirmed.

UNITED STATES ET AL. *v.* BUTTERWORTH-JUDSON CORPORATION ET AL.

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

No. 338. Argued December 9, 10, 1924.—Decided March 2, 1925.

1. Under the Act of October 6, 1917, § 5, c. 79, 40 Stat. 383, the Secretary of War was authorized to advance money to a contractor for carrying out a contract for producing and furnishing supplies of picric acid to the War Department and could provide the "adequate security" called for by the act by requiring the balances of the advanced funds be kept in special deposits subject to a lien in favor of the Government, in addition to requiring a collateral note of the contractor and surety bond. P. 392.
2. Under a contract for the erection of a plant, and manufacture and delivery to the Government of picric acid, the Government advanced the contractor moneys, to be deposited at interest in special bank accounts separate from the contractor's other funds, such money to be drawn on only for specified purposes, and the balance thereof to be accounted for to the Government, either by deliveries of the acid at a specified price or by return of the amount, less authorized deductions, *Held*, (assuming that the title passed, establishing the relation of debtor and creditor,) that the purpose and effect of the special accounts were to provide security for the United States and that an equitable lien upon them existed in its favor, although not expressly reserved in the agreement. P. 393.
3. An equitable lien reserved by the United States as security for the proper use or return of funds advanced to a contractor, which under the agreement were deposited in special bank accounts for the purpose of providing such security,—*held* superior to the right of the banks (they having notice of the agreement,) to set off such deposits against debts owed them by the contractor. P. 394.

297 Fed. 971, reversed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed, as to defendant banks, a suit brought by the United

States against the Butterworth-Judson Corporation and its receivers, the banks and several surety companies. The bill sought an accounting under a contract between the first named defendant and the United States, and to apply the balances of special deposits made by the contractor with the banks to the amount found due under the contract—also a decree for any deficiency against the surety companies on bonds furnished by the contractor. The contractor, receivers and surety companies answered and also filed counter claims against the banks, seeking to have the special account deposits paid over to the United States. The banks' motions to dismiss the bill and counter claims were sustained by the courts below.

Mr. William Marshall Bullitt, with whom *Mr. Solicitor General Beck* and *Mr. Victor House,* Special Assistant to the Attorney General, were on the brief, for the appellants.

Mr. William C. Breed, with whom *Mr. Edward J. Redington* was on the brief, for National Newark & Essex Banking Company of Newark, N. J.

Mr. David Paine, with whom *Mr. Michael H. Cardozo, Jr.,* was on the brief, for Chase National Bank, et al.

Mr. Justice Butler delivered the opinion of the Court.

The United States, plaintiff below, and certain surety companies, defendants below, appeal from a decree of the Circuit Court of Appeals, 297 Fed. 971, affirming that of the District Court dismissing the complaint as to certain banks, defendants below, and dismissing counterclaims set up against the banks in the answers of the surety companies. The decree also dismissed counterclaims against the banks, set up in the answer of the

Butterworth-Judson Corporation and its receivers, defendants below. They have not appealed.

The controversy concerns the right of the banks, as against appellants, to set off against debts owing to them by the Butterworth-Judson Corporation the deposit balances remaining with them in special accounts.

The Butterworth-Judson Corporation, a contractor, and the United States made an agreement, dated May 9, 1918. The contractor agreed to select a site and, for a profit of one dollar and no more, to design, construct and equip thereon a plant for the production of picric acid, and to manufacture for the United States 72,000,000 pounds for 53 cents per pound. The entire cost of the plant was to be paid by the United States. The contractor was to make all necessary expenditures for the construction work, and the United States from time to time was to reimburse it therefor. The United States agreed to recommend to the War Credits Broad an advance payment to the contractor of $1,500,000, upon such terms as the board might prescribe; and also agreed that, if the board should require interest on the advance payment, it would reimburse the contractor as a part of the cost and expense of the latter under the contract. The United States reserved the right to cancel the agreement at any time that its need for the plant or output ceased. It agreed in such event to reimburse the contractor for its expenditures, to assume all its outstanding obligations incurred under the contract, and to pay for all the picric acid wholly or partly manufactured; and it agreed, in case of cancelation before 18,000,000 pounds were delivered, to pay three cents per pound for the undelivered portion up to that amount.

The same parties made a supplementary agreement, dated May 22, 1918. The United States agreed to advance $1,500,000 to the contractor. The contractor agreed to account for the advance with interest, by applying that

amount to the payment of vouchers covering deliveries of picric acid. The contractor reserved the right at any time to repay in cash. If the United States did not recoup, through the deliveries of picric acid, the total amount of the advance with interest, the contractor was required to "return to the Government, on demand, any balance of the said advance and interest after deducting the total of any recoupments made as hereinabove provided, together with all liquidated accounts that may be due and owing under the Principal Agreement from the Government to the contractor." The contractor agreed to give the United States, as collateral security for the recoupment or return of the above mentioned advance and any interest due, its demand note for $1,500,000, bearing six per cent. interest, and to furnish a bond in the sum of $750,000, with surety, for the performance of the agreement. The United States reserved the right, in case of failure of the contractor to comply with the agreement, to sell the note and apply the proceeds to the repayment of the advance, accounting to the contractor for the surplus, if any. But it agreed not to negotiate or demand payment of the note, so long as the contractor was not in default, and to return the note and bond upon complete performance. And the agreement contained the following: "The contractor shall deposit the money advanced hereunder in special accounts in banks, separate from its other funds, and shall draw on said accounts only in payment of expenditures made and obligations incurred in designing, constructing and equipping the plant specified in the Principal Agreement, and for other equipment and for material, labor and overhead expense, required in the direct performance of the Principal Agreement, unless otherwise authorized in writing by the War Credits Board." It was stipulated that the contracting officer might require the contractor to deposit in the special accounts the funds paid by the Government, reimbursing

the contractor for expenditures made from such advance payment. The contractor was to collect from the banks with which such accounts were kept such interest as is usually allowed for similar accounts, and credit or pay that interest to the Government.

The bonds provided for in the principal and supplementary agreements were furnished. The United States advanced $1,500,000 to the contractor, and the latter gave its note as agreed. The contractor deposited the money with defendant banks in special accounts, and entered upon the performance of the agreement. It made withdrawals from these accounts for the specified purposes, and from time to time deposited therein the sums paid to it by the United States in reimbursement of its expenditures. The banks at all times knew that the moneys deposited by the contractor in the special accounts consisted exclusively of the advance payment and replenishments, and that all deposits and balances in these accounts were held pursuant to the principal and supplementary agreements. Shortly after the Armistice, the plant being less than half completed, the United States terminated the principal agreement. No picric acid had been manufactured. The United States reimbursed the contractor and assumed all the latter's obligations under the principal agreement. It was shown in a creditors' suit in the District Court that the contractor was unable to pay its debts, and April 22, 1922, the court appointed receivers who are defendants in this case. Neither the contractor nor its receivers accounted to the United States for any part of the advance of $1,500,000 or interest, except $348,550, leaving unaccounted for, as the United States claims, $1,151,450. The total of the balances in the special accounts on April 22, 1922, was $519,631.99. On that day, the contractor was indebted to each of the banks in an amount in excess of the balance in the special account with it, and each bank set off the amount of such deposit against the debt owed by the contractor.

The suit was for an accounting and to have the balances in the special accounts applied on the amount found unaccounted for and due the United States on the settlement of the account between it and the contractor. In affirming the District Court, the Circuit Court of Appeals held that the advance payment was for supplies purchased and thereafter to be delivered, and that the Secretary of War had no authority to retain title to the moneys advanced and make the contractor agent of the United States for its disbursement; that the supplementary agreement created no relation of trust or agency between the parties, but only that of debtor and creditor. It held that the doctrine of trust, or equitable lien, or equitable assignment, did not apply, and that the banks had the right of set-off. The appellants maintain that the United States had an equitable lien on the balances in the special accounts, and that the banks, having notice of the lien, could not set off the deposits against the debts owed them by the contractor.

The advance payment was made under the authority of an act of Congress of October 6, 1917, § 5, c. 79, 40 Stat. 383, which provides: "That the Secretary of War and the Secretary of the Navy are authorized, during the period of the existing emergency, from appropriations available therefor to advance payments to contractors for supplies for their respective departments in amounts not exceeding thirty per centum of the contract price of such supplies: *Provided,* That such advances shall be made upon such terms as the Secretary of War and the Secretary of the Navy, respectively, shall prescribe and they shall require adequate security for the protection of the Government for the payments so made." The act was intended to relax, during the period of the war, the strict rule against advances of public money. See R. S. § 3648. *The Floyd Acceptances,* 7 Wall. 666. The act plainly authorized advance payments, such as that covered by

the supplementary agreement. It left the terms to the discretion of the Secretary of War, subject to the duty to require adequate security, but the act did not specify or limit the amount or kinds of security to be taken. A lien upon and right over the balances in the special accounts required to be kept is clearly within the meaning of the word "security," as used in the act. The power of the Secretary to exact such a lien or right in addition to the collateral note and surety bond cannot be doubted.

The agreements made the balances in the special accounts security for the obligations of the contractor and so created an equitable lien in favor of the United States.

The established rule as to the creation of equitable liens is stated in *Walker* v. *Brown,* 165 U. S. 654, 664: "The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice." See also *Hauselt* v. *Harrison,* 105 U. S. 401, 405; *Ingersoll* v. *Coram,* 211 U. S. 335, 368; Pomeroy's Equity Jurisprudence (4th ed.) §§ 1233, 1234, 1235. It may be assumed that the United States did not retain title to the advance payment, and that when it was made it became the property of the contractor, and also that the contract contemplated that the relation of debtor and creditor might arise. The contractor's obligation, subject to its right at any time to repay the Government in cash,

was to account for the amount of the advance with interest, by deliveries of the picric acid at the agreed price, or to return that amount to the United States, after making the authorized deductions, if any. The contractor's note and the surety bond were given to secure performance of the agreement. And the requirement that the contractor deposit the money in special accounts in banks, separate from its other funds, and collect and account for interest on deposit balances, and draw on such accounts only for the purposes specified and return the balance of the advances, was additional security. It was to make more certain the performance of the agreement. The purpose and effect of the special accounts was to identify and keep separate the advance payment and replenishments, to limit the use of the fund to the purposes specified, and so to make it available as security to the United States. Failure of the agreement expressly to grant a lien on or declare these balances to be additional security is not significant. See *Barnes* v. *Alexander,* 232 U. S. 117, 121. The Armistice came, and the United States terminated the agreement before there was any production at the plant. The advance and replenishments were not wholly expended, or accounted for by deliveries of picric acid. The contractor was bound to "return" and the United States was entitled to demand and have "any balance of the said advance" remaining after the deductions authorized. The agreements show that the parties contemplated that the need for picric acid might cease before the advance payment was covered by deliveries; and bound the contractor, in that event, to return the balances in the special accounts to the United States. This case is plainly within the rule.

Ordinarily, the relation existing between banks and their depositors is that of debtor and creditor, out of which the right of set-off arises. As a general rule, in the

absence of an agreement to the contrary, a deposit, not made specifically applicable to some other purpose, may be applied by the bank in payment of the indebtedness of the depositor. See *Studley* v. *Boylston Bank,* 229, U. S. 523, 528; *New York County Bank* v. *Massey,* 192 U. S. 138, 145; *National Mahawie Bank* v. *Peck,* 127 Mass. 298, 300. But a bank having notice that a deposit is held by one for the use of or as security for another has only such right of set-off as is not inconsistent with the rights of the latter. Here, the banks had knowledge of the agreements, under which these balances constituted security for the advance made by the United States. By acceptance of the moneys furnished in accordance with the agreement, their right of set-off was made subject to the rights of the United States and the obligations of the contractor. See *National Bank* v. *Insurance Co.,* 104 U. S. 54, 71; *Union Stock Yards Bank* v. *Gillespie,* 137 U. S. 411, 421; *Boyle* v. *Northwestern National Bank,* 125 Wis. 498, 507. The appropriation of these balances by the banks cannot be sustained.

Decree reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 29. Argued December 4, 1924—Decided March 2, 1925.

1. Contracts for sale and delivery of coal to the United States, *construed,* with the advertisements, specifications and conduct of the parties, as providing for delivery on cars at the mine; so that title passed then and the railroad transportation, on government bills of lading, was subject to land-grant rates. P. 397.
2. Provisions in such contracts for service by the vendor in transferring the coal to barges at railroad destination, compensation therefor to be included in price of coal; and reserving right of United States to test coal after transportation and reject it if

not up to specifications,—*held* not inconsistent with passing of title at time of delivery on cars at the mine. P. 400.

3. Where the United States contracted for coal to be shipped by rail and delivered at a vessel, use of government bills of lading, and payment of freight by the United States at land-grant rates, were not enough to sustain a finding that the coal was the property of the United States when hauled by the railroad. P. 401.
4. When a railroad company, entitled to charge the United States the full tariff rate, charges and receives the reduced land-grant rate with full knowledge of the facts, it is bound by its acquiescence and cannot recover the difference. *Id.*
5. Where, under its tariff, the right of a railroad to charge extra for switching and transferring coal at destination depends upon road-haul revenue being equal to as much as a stated rate per ton, land-grant deductions from the latter allowed the United States are not to be considered in determining its liability to such extra charges. P. 402.

57 Ct. Cls. 268, affirmed.

APPEAL from a judgment of the Court of Claims rejecting the Railroad's claim for transportation, switching and handling of freight for the United States.

Mr. Benjamin Carter, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought in the Court of Claims to recover the amount by which tariff-rate freight charges on certain coal were reduced by government land-grant deductions; and also to recover certain charges for switching and handling. The court made findings of fact, and gave judgment for defendant. 57 Ct. Cls. 268. One of the lines of appellant's railroad enters Alabama from the north and extends southerly through Decatur, Birmingham and Flomaton to Pensacola, Florida, and thence easterly to River Junction, Florida. This is a land-aided

line. Appellant has another line extending southwesterly from Flomaton to Mobile. At Mobile and Pensacola, it owns wharves and hoists for transferring coal from cars to boats, and has constructed switches from its main line to the wharves. All of these were built without government aid. The wharves and hoists at Mobile are operated by a coal company and those at Pensacola by appellant.

All the coal in question came from mines in the Birmingham district and was purchased by the United States for engineering work at Mobile, Pensacola and other places on or near the Gulf, except 250 tons bought for the use of the U. S. S. *Tonopah.* It was transported on government bills of lading and was carried in whole or in part by the use of such land-aided railroad. The coal was furnished to the United States under a contract with the Gulf States Coal Company of March 15, 1915, a contract with the Imperial Coal and Coke Company of August 21, 1916, advertisements, specifications, bids and acceptances without formal contracts between November 2, 1914 and September 10, 1917, and a bid and acceptance as of April 8, 1915, for the *Tonopah.*

The Court of Claims held that all shipments, except those made under the contract of March 15, 1915, were subject to land-grant deductions. Appellant maintains that none was subject to the reduced rates. We are of opinion that all the coal, except that furnished the *Tonopah,* was delivered to and became the property of the United States before it was hauled by appellant, and was entitled to the reduced rates.

The general rule is that, if a consignee accepts a shipment, he becomes liable as a matter of law for the full amount of freight charges. *Louisville and Nashville R. R.* v. *Central Iron Co.,* 265 U. S. 59, 70; *Pittsburgh, &c. Ry. Co.* v. *Fink,* 250 U. S. 577, 580. Under the land-grant acts, the United States was entitled to the reduced

rates if the coal when hauled was its property. Acts of May 17, 1856, June 3, 1856, and March 3, 1857, 11 Stat. 15, 17, 200; Acts of April 10, 1869, and March 3, 1871, 16 Stat. 45, 580; Act of March 3, 1875, 18 Stat. 509. *Illinois Central R. R.* v. *United States,* 265 U. S. 209. But the mere use of government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation, and does not give the United States the right of transportation at land-grant rates. See *Transportation Involved in Furnishing Articles by Contractor,* 20 Comp. Dec. 721, 723.

The contract of March 15, 1915, was made pursuant to advertisement and specifications. The specifications, which were attached to and made a part of the contract, show that, in order to permit the United States to take advantage of land-grant rates, the form of proposal contemplated either " delivery of the whole quantity at the mine, from which shipment will then be made on Government bill of lading to Mobile, Pascagoula, or Gulfport, as may be necessary, or delivery of about 7,000 tons at Mobile, Ala., about 5,000 tons at Pascagoula, Miss., and about 6,000 tons at Gulfport, Miss." And it was specified: " The United States will select the method of delivery which under the proposals received proves to be most economical and advantageous. If mine delivery is selected, the coal will be ordered in carload lots for shipment on Government bills of lading to be furnished by the contracting officer, but the contractor will be required to transfer it from cars to barges belonging to the United States and will therefore include in his price his cost for so transferring the coal at all three points of delivery. . . . If prices based on delivery at Mobile, Pascagoula, and Gulfport prove to be more advantageous, then these prices will be accepted and order will be given for carload lots or less as may be required on board United States barges or in bunkers " at the three places

named. The contract contains the following: "In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish and have delivered on United States barges, or in bunkers, from hoists, in carload lots, at Mobile, Alabama, when requested, eighteen thousand short tons, more or less. . . . Coal to be shipped on Government bill of lading, to be furnished by the contracting officer, the United States to pay railroad freight charges between Dixiana [where the mines were located] and Mobile and the contractor to provide for transferring the coal from cars to United States barges and to pay all demurrage charges that may accrue." The United States reserved the option to call on the contractor to tow the coal from Mobile to Pascagoula and Gulfport and agreed to make additional payments for that service, and also reserved the right to inspect and test the coal after transportation and to reject such as did not conform to specifications. The purchase price was to be paid after delivery and final acceptance.

The language "shall furnish and have delivered on United States barges . . .", if it stood alone, might be taken to indicate that delivery was to be made after transportation. But when read, as it must be, with the advertisement and specifications, and in the light of what was done, it appears with reasonable certainty that delivery at the mines was contemplated. The specifications distinctly show that, if mine delivery should be selected, the coal would be ordered in carload lots and shipped on government bills of lading. In harmony with that provision, the contract required shipment in carload lots on forms of bills of lading furnished by the contracting officer, and bound the United States to pay freight charges from the mine to Mobile. This meant that the contractor was not to be concerned with or responsible for the transportation by rail. But, if delivery

at gulf ports had been selected, the contractor would have been bound to hire the carrier and to pay the freight. The provisions of the contract and specifications together amount to a declaration of the parties that there was to be delivery of the whole quantity at the mine, and the conduct of the parties was in harmony with that purpose and inconsistent with an intention that delivery to the United States should be made after transportation by rail was ended. The general rule is that title passes from seller to buyer with the delivery of the goods. All the coal except that furnished the *Tonopah* was delivered by the seller to the United States at the mines on board railroad cars of appellant, a common carrier designated by the United States by the furnishing of government bills of lading. It must be held that title passed at the time of such deliveries. See *United States* v. *Andrews,* 207 U. S. 229, 240, 243.

The contract contemplated service by the contractor, as well as the sale of coal. The contractor agreed to have the coal transferred from cars to government barges, his compensation therefor to be included in the price, and agreed for specified prices to tow it to points on the Gulf coast, if requested so to do, and also undertook to furnish and deliver at various places some 9,000,000 gallons of fresh water for steam and drinking purposes. The services were not essential to or part of the sale, and, as against the other facts found, the agreements to transfer and tow the coal do not indicate that the parties intended that delivery by the seller to the purchaser should not be made until after transportation. *Hatch* v. *Oil Co.,* 100 U. S. 124, 137; *McElwee* v. *Metropolitan Lumber Co.,* 69 Fed. 302, 305; *H. Baars & Co.* v. *Mitchell,* 154 Fed. 322, 326.

The United States reserved the right to inspect and test the coal after transportation and to reject it, if found not to conform to specifications. None of the coal was

rejected. This right was not inconsistent with transfer of title to the United States at the time of delivery of the coal on cars at the mine. *Delaware, Lackawanna & Western R. R.* v. *United States,* 231 U. S. 363, 371, 372; *Illinois Central R. R.* v. *United States, supra.*

By the contract of August 21, 1916, the seller expressly agreed to deliver the coal on railroad cars at the mines at Dixiana. Deliveries of the coal furnished without formal contracts were covered by specifications which were the same as those forming a part of the contract of March 15, 1915.

The conclusion that the coal furnished the *Tonopah* was to be delivered at the mine is not sustained by the facts found. Under the invitation to bid, proposal and acceptance, delivery was to be made alongside the vessel at Pensacola. The coal was transported on government bills of lading. The United States paid the freight less land-grant deductions. The use of government bills of lading and the payment of reduced charges by the United States are not sufficient to sustain a finding that the coal was the property of the United States when hauled by appellant. There is nothing to indicate that title passed before delivery at the vessel.

We agree with the Court of Claims that acceptance of payment of the land-grant rates concludes appellant. Its conduct was inconsistent with an intention to claim the amount of land-grant deduction, as to any of the coal. Appellant rendered bills as to the coal furnished under the above mentioned contracts of March 15, 1915 and August 21, 1916, upon which it stated the basic rate and the amount to be deducted on account of land grant, and claimed the net remaining after the deduction. There was no evidence tending to show that, in presenting its bills at land-grant rates, appellant did not act with full knowledge of all the facts. Settlements for transporting some of the coal were made after the commencement of

this suit, April 26, 1916, but before the amended and supplemental petition was filed, January 9, 1922. Appellant did not protest against any land-grant deductions. It is bound by its acquiescence and consent and cannot recover the amounts deducted. *Oregon-Washington R. R. Co.* v. *United States,* 255 U. S. 339, 345; *New York, New Haven & Hartford R. R.* v. *United States,* 251 U. S. 123, 127; *New York, New Haven & Hartford R. R.* v. *United States,* 258 U. S. 32; *Louisville & Nashville R. R.* v. *United States,* 258 U. S. 374.

The Court of Claims was right in disallowing additional pay for switching cars to wharves or for transferring coal from cars to boats. The tariff rates on this coal for bunkerage and purposes other than export or coastwise traffic were $1.10 per short ton via Flomaton to Mobile or Pensacola. Under the tariff the cost of transferring such coal from cars to vessels at Mobile and Pensacola was assumed by appellant, where the road-haul revenue was $1 per ton or more; but if such revenue was less there was an additional charge of ten cents per ton, plus $2 per car for switching, subject to a maximum of $1 per ton. After land-grant deduction, the balance to be paid in money was less than a dollar per ton. But the land grant, made many years ago in aid of the railroad enterprise, was not a mere gift or gratuity. See *Burke* v. *Southern Pacific R. R. Co.,* 234 U. S. 669, 679. The carrier's obligation to haul property of the United States at reduced rates was a part of the consideration for which the land grant was made. Part of appellant's compensation for hauling the coal was paid in land, and the balance was paid in money. It cannot be said that the total was less than a dollar per ton.

Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 83. Argued December 4, 1924.—Decided March 2, 1925.

A railroad company which made out and presented freight bills to the Government for net transportaton charges after making land grant deductions, and accepted without protest payment of the amount so claimed,—*held* not entitled to recover upon the ground that the Government should not have been allowed the deductions.

58 Ct. Cls. 33, affirmed.

APPEAL from a judgment of the Court of Claims rejecting the Railroad's claim for transportation of freight.

Mr. Benjamin Carter, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellant brought this action, October 29, 1917, to recover the amounts by which freight charges on certain materials transported over its railroad were reduced by the application of government land-grant rates. All the freight was transported on government bills of lading and moved in whole or in part by the use of appellant's land-aided lines of railroad. The shipments, including coal, sand, cement, piling and lumber, were made in the years 1909 to 1916, inclusive. Some of appellant's lines of railroads were constructed by the aid of land granted by an Act of Congress of May 12, 1864, § 3, c. 84, 13 Stat. 73. See *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442; Act of August 5, 1882, c. 390, 22 Stat. 261. The appellant deemed the United States to be entitled to have its property transported over such

lines at 50 per cent. of the tariff rates. Two of appellant's lines of railroad in Minnesota were constructed by the aid of land granted by an Act of Congress of July 4, 1866, § 3, c. 168, 14 Stat. 88. Appellant made no charges for the shipments that moved over these lines. Appellant alleged that when it received and transported such freight it believed it belonged to the United States, and had no intimation that the shipments were private property until the latter part of 1916. The Court of Claims held that all the shipments belonged to the United States, and that it was entitled to transportation of its property at 50 per cent. of the tariff rates on the aided lines first above referred to and to free transportation on those last mentioned, and found that it was not shown whether appellant was informed as to the title to the property.

The court further found that in every instance appellant made out and presented freight bills to the Government for the net charges after making proper land grant deductions, and that the payment of the full amount so claimed was made and accepted without protest. Appellant is not entitled to recover. *Louisville & Nashville R. R.* v. *United States,* decided this day, *ante*, p. 395, and cases cited.

Judgment affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* STROUD.

CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 168. Argued January 14, 1925.—Decided March 2, 1925.

Where a carrier has two routes by which freight may move between two points within a State, one route wholly within the State and the other partly through another, a prospective shipment which, following the carrier's practice and in the absence of preference

expressed by the shipper, would move over the latter route, is to be governed by the Interstate Commerce Act, in respect of the carrier's duty to avoid discrimination in furnishing cars, and a State regulation in that regard is therefore inapplicable. P. 407.
212 Mo. App. 512, reversed.

CERTIORARI to a judgment of the Court of Appeals of Missouri affirming, with a reduction, a judgment for treble damages recovered by Stroud from the Railroad Company, under Rev. Stats. Mo. §§ 9985, 9990, for discrimination in furnishing freight cars.

Mr. Thomas T. Railey for petitioner. *Messrs. Edw. J. White, Jas. F. Green,* and *J. C. Sheppard,* were on the brief.

Mr. George H. Moore, for respondent, submitted.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought by the respondent against the petitioner in the Circuit Court of Ripley County, Missouri, to recover treble damages under §§ 9985, 9990, Revised Statutes of Missouri, 1919. The petitioner is a common carrier of freight and passengers for hire by railroad in Missouri and other States. Section 9985 contains the following: "It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person . . . in the transportation of goods . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage with respect to such transportation . . ." Section 9990, among other things, makes the carrier liable to any person injured by a violation of the above quoted provision for three times the amount of damages sustained.

June 12, 1920, respondent, who was engaged in the lumber business, had 20,000 feet of hardwood lumber

ready for shipment at Oxly, Missouri, a station on petitioner's railroad, and applied for two cars on which to ship the lumber to Saint Louis, Missouri. The petitioner failed to furnish him any cars until August 19, 1920. After he had ordered the cars, and before they were delivered, other shippers at Oxly applied to the petitioner for, and were furnished, cars for the transportation of lumber. Respondent alleged that by § 9985 petitioner was prohibited from so discriminating against him, and that as a result of such unlawful discrimination he was damaged in the sum of $1,000. The complaint alleged the foregoing facts, but contained no allegation that respondent attempted to designate any route, intrastate or interstate, for the transportation of his lumber. The answer denied the discrimination and alleged that petitioner moves its cars from Oxly to Saint Louis over two routes: one wholly within the State of Missouri; the other by way of Thebes, crossing the Mississippi River at that point and running through the State of Illinois into Saint Louis; that the usual and regular way of routing cars loaded with lumber at Oxly and consigned to Saint Louis would be over the latter route through the State of Illinois and would be interstate commerce, and that § 9985 has no application to the facts stated in respondent's complaint.

The first trial resulted in a judgment for respondent which was reversed on appeal. 210 Mo. App. 311. However, the Court of Appeals held that, under these sections, an action lies for damages for discrimination in furnishing cars for the shipment of lumber which could have gone over either an intrastate or interstate route. At the second trial, petitioner's superintendent of transportation testified that, under the routing circular then in force, respondent's lumber would have been hauled over the interstate route; that the line on the Missouri side of the river passes over Iron Mountain and other Ozark

hills, and that the routing through Illinois over the more level line is made as a matter of operating convenience and economy. There was no other evidence on the point. Cf. 210 Mo. App. 316. Respondent did not attempt to designate any route, intrastate or interstate, and there is nothing to show that he expressed or had any preference in respect of the route. At the close of all the evidence in the case, the petitioner requested the court to instruct the jury to return a verdict for petitioner. The court refused to do so, and, notwithstanding the fact that respondent's lumber would have moved over the interstate route, submitted the case to the jury. There was a verdict of $1,000 for respondent, and judgment was entered for three times that amount. Petitioner appealed. 212 Mo. App. 512. The Court of Appeals held that respondent was not entitled to a verdict in excess of $502.50, and ordered that, if respondent filed remittitur, judgment for $1,507.50 would be affirmed. The remittitur was filed and judgment entered accordingly. The case is here on certiorari. § 237, Judicial Code.

Congress, in the exertion of its power over commerce among the States, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act, § 1, (3), (4), (6), (10), (11), (12), (14); § 3 (1); §15 (1). See *United States* v. *New River Company,* 265 U. S. 533, 541. Section 3, c. 104, 24 Stat. 380 (as amended February 28, 1920, § 405, c. 91, 41 Stat. 479) is very similar to § 9985, and contains the following: " That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or dis-

advantage in any respect whatsoever." It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to Saint Louis over the route partly within and partly outside of Missouri is interstate commerce. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 620; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. It was shown that the shipment would have moved by that route. The record discloses no facts which would impose upon petitioner any obligation to haul respondent's lumber over the intrastate route. See *Northern Pacific Ry Co.* v. *Solum*, 247 U. S. 477, 482. The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 435; *Steel* v. *Railroad*, 165 Mo. App. 311, 317.

Judgment reversed.

UNITED STATES AND BOWERS, COLLECTOR OF INTERNAL REVENUE, *v.* KAUFMAN, TRUSTEE IN BANKRUPTCY OF FINKELSTEIN, ET AL.

UNITED STATES AND BOWERS, COLLECTOR OF INTERNAL REVENUE, *v.* COXE, RECEIVER OF JONES AND BAKER, BANKRUPTS.

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

Nos. 515 and 516. Argued January 13, 1925.—Decided March 2, 1925.

1. A tax assessed under Revenue Act of 1918 upon the income of a partner, is a tax against the individual and not the partnership,

whether or not his income was derived from partnership business. P. 410.

2. In proceedings in bankruptcy against a partnership the partnership assets must first be applied to the payment of the partnership debts, and the United States is not entitled to any priority of payment out of such assets for a tax due it from an individual partner, except to the extent of the share of such partner, if any, in the surplus remaining after the payment of the partnership debts. Bankruptcy Act, §§ 5f, 64 (a); Rev. Stats. §§ 3466, 3186, as amended, considered. P. 411.

298 Fed. 11, affirmed.

CERTIORARI to judgments of the Circuit Court of Appeals affirming orders of the District Court, in bankruptcy, which denied the right of the United States to have the income taxes of individual partners paid out of the assets of their bankrupt firms in preference to the claims of partnership creditors.

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

Mr. J. M. Hartfield, with whom *Mr. Alfred C. Coxe Jr.* and *Mr. William St. John Tozer* were on the brief, for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These two cases were heard together in the Circuit Court of Appeals. They involve a single question relating to the extent of the priority of the United States in the collection of taxes in bankruptcy proceedings.

In 1921, on an involuntary petition filed in the Southern District of New York, Finkelstein Brothers, a partnership, and the individual partners thereof, were adjudged bankrupts. In 1923 the Collector of Internal

Revenue filed proof of claim for an income tax assessed against Abraham Finkelstein, one of the partners, for the year 1919. It is stipulated that the income on which this tax was based "was derived from the business of the co-partnership." No individual assets of Finkelstein had come into the hands of the trustee, and the partnership assets were insufficient to yield any surplus after the payment of the partnership debts. The Collector claimed that the tax against Finkelstein should be paid out of the partnership assets prior to the partnership debts. The referee denied this claim, and ordered that the partnership assets first be applied to the payment of the partnership debts. This order was affirmed by the District Judge.

In 1923 an involuntary petition in bankruptcy was filed in the same court against Jones & Baker, a partnership. A receiver was appointed, who collected and held the partnership assets. Before an adjudication of bankruptcy the partnership offered a composition to its creditors at less than the full amount of their claims. This was confirmed by the District Judge. Before the partnership assets were distributed, the Collector of Internal Revenue filed proofs of claims against the individual partners for income taxes assessed against them for the years 1918, 1919 and 1920. It does not appear that the income on which these taxes were based was derived from the business of the partnership. The Collector claimed that these taxes should be paid out of the partnership assets prior to the payments to the partnership creditors. The District Judge denied this claim of priority.

On appeals to the Circuit Court of Appeals both orders of the District Court were affirmed. 298 Fed. 11. Writs of certiorari were granted by this court. 266 U. S. 596.

1. These taxes were assessed against the individual partners and due from them to the United States. They were neither assessed against, nor due from, the partner-

ships. The tax assessed against Finkelstein was none the less an individual tax because the income on which it was based was derived from partnership business. The Revenue Act of 1918, 40 Stat. 1057, c. 18, § 218 (a), under which it was assessed, specifically provided that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity." The provision that in computing the income of each partner there should be included his distributive share of the income of the partnership, whether distributed or not, did not change the nature of the tax or make it one against the partnership.

2. The Bankruptcy Act gives the United States no priority of payment out of partnership assets for a tax due from an individual partner. Section 64 (a), which provides that "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors," manifestly relates to the payment of the taxes out of the estate of the bankrupt from whom they are "due and owing." Where the bankrupt owing the tax is a member of a partnership, it gives the United States no priority of payment out of the partnership estate.

The Bankruptcy Act clearly recognizes the separate entity of the partnership for the purpose of applying the long-established rule as to the prior claim of partnership debts on partnership assets and of individual debts on individual assets, and "establishes on a firm basis the respective equities of the individual and firm creditors." *Francis* v. *McNeal,* 228 U. S. 695, 700; *Schall* v. *Camors,* 251 U. S. 239, 254. Section 5f provides that: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any sur-

plus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." The intention of Congress that the partnership assets shall be first applied to the satisfaction of the partnership debts, and that only the interests of the partners in the surplus remaining after the payment of partnership debts shall be applied in satisfaction of their individual debts, is plain.

It is urged, however, on the authority of *United States* v. *Herron,* 20 Wall. 251, 255, and other cases, that as the United States is not named in this section of the Bankruptcy Act it is not bound by the rule for marshalling assets thereby established. But, however this may be, it is clear that, independently of the provisions of this section, the priority of payment of taxes given the United States by § 64(a) extends only to the bankrupt's share in the surplus of the assets of a partnership of which he is a member. This follows from the decision in *United States* v. *Hack,* 8 Pet. 271, 275, a case arising under the Act of March 2, 1799,[1] providing that if the maker of any bond given to the United States for the payment of duties became insolvent or committed an act of bankruptcy, the debt due the United States on such bond should be first satisfied. The maker of such a bond had become insolvent. He had no individual property, and the assets of an insolvent partnership of which he was a member, were insufficient to pay the partnership creditors. It was held, on these facts, that the United States was not entitled to priority of satisfaction out of the partnership assets, since the Act merely gave it priority of pay-

[1] 3 Laws, U. S. 136, 197; 1 Stat. 627, 676, c. 20, § 65.

ment out of the property of its debtor, and the rule was too well settled to be questioned that his interest in the partnership property was his share in the surplus after the partnership debts were paid, and that such surplus only was liable for his separate debts. To the same effect is *United States* v. *Evans*, Crabbe, 60, 25 Fed. Cas. 1033, a case arising under the same Act. These decisions are directly applicable to § 3466 of the Revised Statutes—on which the United States relies—which incorporated the provisions of the Act of 1799 and similar Acts of August 4, 1790, and March 3, 1797, in the general provision that whenever any person indebted to the United States is insolvent, the debts due to the United States shall be first satisfied, and that this priority shall extend to cases in which an act of bankruptcy is committed. And in so far as this section, under the rule stated in *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, may now be applicable in bankruptcy proceedings, it must be held that any priority of payment to which the United States is entitled for a debt due it from an individual partner, extends only to his share in the surplus of the partnership assets.

There is no conflict between the decisions in these cases and in *Lewis* v. *United States*, 92 U. S. 618, 624, and *In re Strassburger*, 4 Woods 557, 23 Fed. Cas. 224, on which the United States relies. In the *Lewis Case* the members of the firm of Jay Cooke & Co. had been adjudicated bankrupts, and a trustee had been appointed who held their individual assets and those of the firm as well. This firm was not indebted to the United States, but another firm, of which several of the bankrupts were members, was so indebted. On these facts it was held that the bankrupt members of such other firm, as to its indebtedness, stood to the United States in the relation of "individual debtors," and that under the priority given to debts due the United States by § 3466 of the Revised

Statutes, recognized and reaffirmed in § 28 of the Bankruptcy Act of 1867, it was entitled, as a creditor of these individual bankrupts, to priority of payment out of their individual estates. There was, however, no suggestion that the United States as a creditor of these individual bankrupts was entitled to priority of satisfaction out of the partnership assets of Jay Cooke & Co. In the *Strassburger Case,* Mr. Justice Bradley, sitting at circuit, while explicitly recognizing the rule that where one member of a firm is indebted to the United States, its priority extends only to his interest in the surplus of the partnership assets, held that as the United States had a judgment against both members of the firm, it was entitled to priority of payment thereof out of their joint property in preference to their joint creditors. Whether a correct result was reached we need not inquire. And if to any extent the reasoning in this case may be in conflict with that in the *Hack Case,* it cannot be approved.

Nor is the contention of the United States strengthened by the provision in § 3186 of the Revised Statutes, as amended by the Act of March 4, 1913, c. 166, 37 Stat. 1016, that the amount due the United States from any person as a tax shall be a lien on all property and rights to property belonging to such person. To whatever extent this statute may be now applicable in a bankruptcy proceeding, under its very terms the lien includes only the property of the person owing the tax; and in the case of a partner owing an individual tax, it extends only to his interest in the surplus of the partnership property.

It results that in proceedings in bankruptcy against a partnership the partnership assets must be first applied to the payment of the partnership debts, and that the United States is not entitled to any priority of payment out of such assets for a tax due it from an individual partner, except to the extent of the share of such partner, if any, in the surplus remaining after the payment of the partnership debts.

3. The United States also relies, independently of the foregoing matters, upon the decision in *Re Brezin* (D. C.) 297 Fed. 300, 306, in which it was held that as the individual partners, instead of drawing out their distributive shares of the income of the partnership from year to year had left a large portion thereof in the partnership business, the United States had a claim in the nature of an equitable lien for the collection of their individual income taxes which it could follow into the partnership property. Whether or not this case was correctly decided on its peculiar facts, it has no application to either of the present cases, in which no such facts appear.

The decree of the Circuit Court of Appeals is

Affirmed.

PRICE ET AL. *v.* MAGNOLIA PETROLEUM COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 14. Argued November 13, 14, 1923.—Decided March 2, 1925.

The Oklahoma Enabling Act provided that sections 33 of the public lands, theretofore reserved, should be apportioned and disposed of as the legislature might prescribe; that, where any of the lands granted the State were valuable for minerals, they should not be sold before January 1, 1915, but might be leased for periods not exceeding five years on royalties, providing that agricultural lessees in possession should be reimbursed by the mining lessees for damages done their interests by mining operations; that the lands "if sold" might be appraised and sold at public sale, under such regulations as the State might prescribe, the preference right to purchase at the highest bid being given the lessee "at time of such sale"—*Held*, that an agricultural lessee was not entitled under the act to compel a sale of the land covered by his lease in order that he might purchase it; and that the State was authorized, finding the tract valuable for oil and gas, to execute an oil and gas lease to other parties, subject to the surface rights of the agricultural lessee. Act of June 16, 1906, §§ 8, 10, c. 3335, 34 Stat. 267. P. 421.

86 Okla. 105, affirmed.

ERROR to a judgment of the Supreme Court of Oklahoma reversing a decree in favor of the plaintiffs in error, Price and wife, in a suit brought by the Petroleum Company to enjoin them from interfering with its operations under an oil and gas lease on land covered by a prior agricultural lease to Price. The State intervened to assert its ownership of the land and uphold the oil and gas lease.

Mr. E. E. Blake, with whom *Messrs. J. F. Sharp, C. B. Stuart, M. K. Cruce,* and *W. C. Stevens* were on the brief, for plaintiffs in error.

Messrs. B. B. Blakeney, George E. Merritt and *A. T. Boys,* for defendants in error. *Messrs. George F. Short,* Attorney General of the State of Oklahoma, *C. W. King,* Assistant Attorney General, *W. H. Francis* and *Herbert Ambrister* were also on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The subject matter of this controversy is a tract of land held by the State of Oklahoma as part of its public land, on which it made two leases: the first an agricultural lease to William T. Price; the second an oil and gas lease to the Magnolia Petroleum Co. The Magnolia Company brought a suit in equity in a district court of the State to enjoin Price and wife from interfering with its operations under the oil and gas lease. They made defense, alleging that the oil and gas lease was invalid and impaired their preference right under the agricultural lease to purchase the entire tract, including the oil and gas therein. The State, as intervener, asserted its ownership of the land and the validity of the oil and gas lease. The District Court, on final hearing, entered a decree in favor of Price and wife. This was reversed by the Su-

preme Court of Oklahoma, which adjudged and decreed that the oil and gas lease to the Magnolia Company was valid, and that Price and wife be perpetually enjoined from interfering with its operations. 86 Okla. 105.

The federal questions presented rest, in substance, upon the contention that as applied in this case the Oklahoma acts under which the gas and oil lease to the Magnolia Company was executed, deprived Price, as the agricultural lessee, of a preference right to purchase the land in its entirety, vested in him by the Oklahoma Enabling Act of 1906.

The tract in controversy is a quarter of a section numbered 33 lying within the lands formerly included in the Territory of Oklahoma that were opened to settlement by an Act of June 6, 1900.[1] This Act provided that sections 13 and 33 in each township should not be subject to entry, but should be "reserved" for "university, agricultural colleges, normal schools and public buildings of the Territory and future State of Oklahoma."

Prior to statehood the Territorial Leasing Board made short term agricultural leases on these reserved lands, with preference rights of re-leasing.[2]

The Enabling Act of June 16, 1906,[3] by § 7 and § 8, granted to the State, upon its admission, sections 13, 16 and 36 in the several townships of the Territory of Oklahoma, for the use and benefit of universities, colleges and schools, as therein specified.

By § 8 it was provided that sections 33 theretofore reserved for charitable and penal institutions and public buildings, should "be apportioned and disposed of as the legislature of said State may prescribe"; and, further, that "Where any . . . of the lands granted by this Act to the State . . . are valuable for minerals,"

[1] 31 Stat. 672, c. 813, § 6.

[2] Act of May 4, 1894, c. 68, 28 Stat. 71.

[3] 34 Stat. 267, c. 3335.

including gas and oil, they should not be sold by the State before January 1, 1915, but might be leased for periods not exceeding five years, at a fixed royalty in addition to any bonus offered, "Provided, however, That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations."

By § 10 it was provided that "said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale . . . under such rules and regulations as the legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands, may be leased for periods of not more than five years . . . : *Provided,* That before any of the said lands shall be sold . . . the said lands and the improvements thereon shall be appraised by three disinterested appraisers . . . and in case the leaseholder does not become the purchaser, the purchaser at said sale shall . . . pay to . . . the leaseholder the appraised value of said improvements, and to the State the amount bid for the said lands, exclusive of the appraised value of improvements."

The terms and conditions of the Enabling Act were accepted by the State of Oklahoma by an "irrevocable" ordinance. *Coyle* v. *Oklahoma,* 221 U. S. 559, 564; *Sperry Oil Co.* v. *Chisholm,* 264 U. S. 488, 493. And the State by its constitution accepted all grants of land made by the United States under the Act, "for the uses and purposes and upon the conditions, and under the limitations for which the same are granted." [4]

The state constitution placed the sale and rental of the public lands in charge of Commissioners of the Land Office.[5] By subsequent acts of the legislature it was pro-

[4] Art. XI, § 1. [5] Art. VI, § 32.

vided: That the Commissioners should have an appraisal made of all lands granted the State for educational and public building purposes, showing the value of the lands and of the improvements thereon, and the names of the lessees occupying them;[6] that when any tract of the public lands was known or deemed by the Commissioners to contain oil or gas or to be valuable for such purposes, they should segregate the oil and gas deposits from the surface use and interest, thereby withdrawing the land from sale until they terminated such segregation, and might separately lease the oil and gas interest therein;[7] that the Commissioners should sell certain of the public lands, including sections 33 granted to the State for charitable institutions and penal buildings, at public auction, at which any lessee holding a lease thereon should "have the preference right to purchase" at the highest bid;[8] and that the reserved lands whose proceeds were to be used for penal, charitable and public buildings, should be leased until sold as provided by law.[9]

Oklahoma was admitted as a State in November, 1907.[10] The quarter section in controversy was not known then or for many years thereafter as oil and gas land. It was then held by one Click under an agricultural lease from the Territorial Leasing Board to January 1, 1908, with "a preference right" of re-leasing. This right of re-leasing was not questioned by the State. The lease was extended for two successive years, first under a general statute,[11] and then under rules of the

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[6] Laws, 1907-8, c. 49, art. 2, p. 484.

[7] Laws, 1907-8, c. 49, art. 4, p. 490; modified in immaterial respects, by Laws, 1917, c. 253, p. 462.

[8] Laws, 1909, c. 28, art. 2, p. 448.

[9] Laws, 1909, c. 28, art. 1, p. 440.

[10] Proclamation of the President, Nov. 16, 1907, 35 Stat. pt. 2, p. 2160.

[11] Laws, 1907–8, c. 49, art. 2, p. 484.

Commissioners. In January, 1909, the land and the improvements thereon were appraised. In October, Price purchased the interest of the lessee. After January 1, 1910, he continued to occupy the land and pay rentals thereon to the Commissioners, and was recognized by them as the lessee. In 1911, the Commissioners, after advertisement, sold at public sale the three other quarters of the same section 33, and other public lands in the vicinity. There is evidence that Price appeared at this sale and requested the officers in charge to sell his quarter section also, and that this was refused, the reason given being that it had not been advertised. There is no evidence that he thereafter requested, at any time, that a sale be made of this quarter section.

In 1913, the Commissioners leased Price this quarter section, for agricultural and grazing purposes, until December 31, 1914. The lease recited that it was subject to the right of the State to sell the land at any time and that, upon such sale, Price, as lessee of the land, should be entitled to purchase the same at the highest bid, subject to the conditions provided by law; and also provided that he should have "the preference right" to re-lease the land as provided by the laws of the State. This lease was subsequently extended for one year; and thereafter Price, without any formal extension or renewals of the lease, continued in possession of the premises and paid rentals to the Commissioners, and was in such possession, holding over as the agricultural lessee recognized by the Commissioners at the time this suit was commenced. His status as a lessee has not been questioned in any way, and the case has been tried by all parties on the theory that he has the full rights of an agricultural lessee of the land.

In 1915, the Commissioners declared this quarter section valuable for mineral purposes, and adopted a motion segregating the same, and withholding it from sale. And

in 1919 they executed the oil and gas lease to the Magnolia Company that is now in controversy. The lease contained a provision that the Company should be liable to the surface lessee for all damage accruing to the surface interest. This liability the Company has never disputed.

The Supreme Court of Oklahoma held, in substance, that Price had no right either under the Enabling Act or the Oklahoma statutes to require the State to sell the land at any time; and that the action of the Commissioners in withholding the land from sale, segregating the oil and gas, and leasing the same to the Magnolia Company, was in accordance with the provisions of the State statutes, and not in violation of any right vested in Price as an agricultural lessee either under those statutes or under the Enabling Act.

The underlying federal question presented is based upon the contention that under the provisions of the Enabling Act, constituting a trust upon which the public lands were granted to the State, Price, as an agricultural lessee, was vested with the preference right to purchase the land as an entirety and to require the State to sell the entire interest in the same, and that the Oklahoma statutes authorizing the segregation of the oil and gas and the execution of a separate lease thereto, as applied in this case, impaired the value of the fee in the land and deprived Price of his preference right to purchase the land as an entirety, in violation of the due process clause of the Fourteenth Amendment.

We cannot sustain this contention. By § 8 of the Enabling Act it was provided that sections 33 should be apportioned and disposed of "as the legislature . . . may prescribe"; and, further, that where any of the lands granted to the State "are valuable for minerals" they should not be sold before January 1, 1915, but might be leased upon royalty, provided that the mining lessee

should reimburse the agricultural lessee for damage done by the mining operation. This authority to make mining leases clearly applied not merely to the land then known to be valuable for minerals but to such as might thereafter be found to be valuable for such purposes; and it did not require the State to sell such lands at any time, but merely prohibited their sale before the date specified. It impliedly authorized the making of mining and agricultural leases upon the same land. Furthermore § 10, by its specific terms, did not require the State to sell sections 33 at any time, but merely provided that "if sold" they might be appraised and sold at public sale, under such rules and regulations as the State might prescribe, the preference right to purchase at the highest bid being given to the lessee "at the time of such sale."

We think it clear that these provisions of the Enabling Act, read together, gave the State entire discretion as to the time of selling these lands and the extent to which they should be sold. They did not require that all or any part of them should be sold, but merely provided that "if" the State sold them they must be sold in the manner prescribed, and the preference right of purchase be given the lessee in possession at the time of sale. The State was not bound to sell them at any time, or at all, but might retain them as long as it deemed proper, and make meanwhile such leases as it desired not in conflict with the provisions of the Act. There was no provision in the Act, and none is implied, that the agricultural lessee might require the State to sell the land in its entirety whenever he desired to purchase the same; and nothing that gave him any right to purchase the land in its entirety or that prevented the State from executing oil and gas leases, as well as agricultural leases, whenever it deemed this the most advantageous method of realizing the full value of the lands for the public purposes for which they were granted to it. Plainly it was not in-

tended that the mere making of an agricultural lease should put the State at the mercy of the lessee, and require a sale of the land before its value had been ascertained or the available revenue derived from it. In short, the preference right of purchase given the lessee by the Act was merely the preference right of purchasing the land in the condition in which it might be when and if the State chose to sell it; and not a right to compel the State to sell it, either in its entirety or otherwise, whenever he wished to buy.

It results that the Oklahoma statutes under which, as held by the Supreme Court of the State, the Commissioners were authorized to withhold this quarter section from sale and to execute the oil and gas lease to the Magnolia Company, did not impair any right vested in Price as an agricultural lessee by the provisions of the Enabling Act, or deprive him of any right as such lessee in violation of the Fourteenth Amendment.

In so far as the other federal questions presented were in issue under the pleadings or raised in the court below, they are necessarily answered by what we have already said, and need not be considered in detail. They show no error in respect to any federal question. And the judgment is

Affirmed.

PEARSON ET VIR *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 264. Argued January 28, 1925.—Decided March 2, 1925.

Where the Government erected and used buldings on leased land with the oral permission of the lessee, and subsequently removed them, although the lessors contended that the right to do so had expired by the terms of the lease, *held;* (*a*) That, in the absence of proof that the Government had knowledge of the terms of the lease or of the lessors' acquiescence in the user, no relation

of landlord and tenant existed between the lessors and the United States under the lease from which an agreement of the latter to pay for the property could be implied. P. 426. (*b*) The Government having removed the buildings under claim of right, no agreement to pay as for property taken for public use could be implied. P. 427.

58 Ct. Cls. 485, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition on demurrer

Mr. George F. Williams, with whom *Mr. Henry C. Clark* was on the brief, for appellant.

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

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought under the Tucker Act [1] by Margaret W. Pearson and her husband to recover the value of buildings and improvements erected by the War Department on leased premises and removed after the expiration of the lease. The United States demurred to the petition on the ground that it did not state a cause of action within the jurisdiction of the court. The demurrer was sustained, and the petition dismissed. 58 Ct. Cls. 485.

The petition shows the following facts: On September 11, 1917, the claimants leased to the Chamber of Commerce of Jacksonville, Florida, a tract of land, to be used solely for federal camp purposes, for the maximum term of three years. The lease provided that all buildings and improvements placed upon the land during said term by the lessee, its successors or assigns, should re-

[1] Act of March 3, 1887, 24 Stat. 505, c. 359; Jud. Code, § 145.

main " the exclusive property of the lessee, its successors or assigns," and might be removed within the period of three months after the expiration of the lease. Shortly after the execution of the lease the Chamber of Commerce agreed " verbally " with the War Department that the land might be used and occupied as a portion of a training camp for United States troops; and the claimants acquiesced in and consented to its use and occupancy by the United States under and subject to the terms, conditions and provisions of the lease. The land was thereafter included in Camp Joseph E. Johnston. The War Department erected thereon a base hospital, homes for nurses and other buildings, and placed extensive improvements thereon. By a general provision in an Act of March 3, 1919,[2] this and other Camp hospitals were " permanently transferred to the Treasury Department for the use of the Public Health Service," with so much of their equipment, sites and leases, and such other buildings and land as might be required. The lease to the Chamber of Commerce expired on September 11, 1920. On December 9, 1920, the plaintiff's attorney wrote the Commanding Officer of Camp Johnston that by the terms of the lease all right of occupation and of entry and removal of buildings would cease on December 11, and that on that date the property should be finally surrendered to the plaintiffs without further removal or molestation of any of the property remaining thereon; and suggesting a conference in reference to the matter. The Commanding Officer replied to him that the hospital had been transferred to the Public Health Service, to which his letter had been referred, and with which the matter should be taken up. After some further correspondence, the Surgeon General of the Public Health Service, on March 28, 1921, wrote the claimants'

[2] 40 Stat. 1302, c. 98, § 2.

attorney, describing the land as the Pearson Tract "occupied by the United States," and stating that: "Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921." On April 6 the claimants' attorney replied reiterating the claim that under the terms of the lease all buildings, etc., were then part of the property and legally were no longer subject to removal; and suggesting a conference and proper adjustment of the matter. Without replying to this letter the Public Health Service continued to tear down and remove all the buildings and improvements that had been placed upon the land, and completed such removal by the end of June, 1921.

The petition alleges that the value of the buildings and improvements thus removed exceeds $100,000, and prays judgment against the United States for the full value of the property "removed as aforesaid from said lands in violation of the rights of petitioners."

1. The petition does not allege any contract by the United States, either express or implied in fact, to pay the claimants the value of the buildings and improvements removed by it. Nor does it set forth facts on which such a contract will be implied. It does not appear from the petition that the United States stood in any contractual relation with the claimants, as an assignee of the lease or otherwise. On the contrary it appears that it merely used the land under the oral permission of the Chamber of Commerce. And while the claimants allege, in general terms, that they acquiesced in and consented to such use and occupancy subject to the terms of the lease, it is not shown that the War Department either knew this fact or had any knowledge of the terms of the lease. Therefore, whatever may be the construction and effect of the lease as to the right of

removing buildings and improvements, or the implied obligation of the lessee or its assigns in regard thereto, the petition fails to show that as between the claimants and the United States there existed any relationship of landlord and tenant under the lease from which an agreement to pay for the property can be implied.

2. The petition shows no ground of recovery on an implied agreement upon the part of the Government to pay the claimants for property taken for public use. No recognition of the plaintiffs' title is alleged in the petition. On the contrary the facts shown plainly indicate that the buildings and improvements were removed by the Government as its own property under the claim of right. Under these circumstances no agreement to pay for them can be implied. Whether the Government's claim was well or ill founded, is immaterial. If it was unfounded, and the claimants' property rights violated, the cause of action therefor would be one sounding in tort, for which the Tucker Act affords no remedy. *Klebe* v. *United States,* 263 U. S. 188, 191, and cases cited.

The demurrer was rightly sustained, and the judgment is

Affirmed.

LANCASTER ET AL., RECEIVERS OF THE TEXAS & PACIFIC RAILWAY, *v.* McCARTY ET AL.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 148. Submitted December 11, 1924.—Decided March 9, 1925.

The second Cummins Amendment, (August 9, 1916, c. 301, 39 Stat. 441,) authorizing carriers to limit liability upon property received for transportation to the value declared in writing by the shipper, where the rates are based on such value pursuant to authority from the Interstate Commerce Commission,—*held* applicable, and controlling the state law, in respect of a claim for damage to goods

shipped intrastate between two points in Texas subject to tariff and classification adopted by the carrier pursuant to an order of the Commission requiring the carrier to remove discrimination against interstate commerce resulting from lower intrastate rates. *Shreveport Case,* 234 U. S. 342. P. 430.

248 S. W. 816, reversed.

ERROR to a judgment of the Court of Civil Appeals of Texas sustaining a recovery from the receivers of the Railway for damages to goods shipped.

Mr. T. D. Gresham and *Mr. F. H. Prendergast* for plaintiffs in error, submitted.

No brief filed for the defendants in error.

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

This was a suit for damages in the County Court of Eastland County, Texas, by the defendants in error, partners as the Cisco Furniture Company, to recover from the plaintiffs in error, the Receivers of the Texas & Pacific Railway, $198 for injury to two rugs and to three chairs shipped by the Furniture Company from Fort Worth, Texas, over the Railway to Cisco, Texas, and $20 for attorney's fees exacted by a state statute for the delay of the Railway in allowing and paying the claim. The real issue here is whether the amount of the damages for the admitted injury should be measured by the statutory law of Texas or by the regulations of the Interstate Commerce Commission with respect to the classification of traffic and fixing of rates, as directed by it in accordance with the decree by the Commerce Court of the United States, affirmed by this Court in *Houston & Texas Railway Co.* v. *United States,* 234 U. S. 342, known as the *Shreveport Case.* The damage to the chairs is not involved. The question arises only as to the two rugs. The transporta-

tion began at Fort Worth, Texas, and ended at Cisco, Texas. It was carried on under a bill of lading according to the forms of the Interstate Commerce Commission, which provided that the rates should be 70 cents per 100 pounds on rugs classified as not exceeding in value $75. The bill of lading was stamped with the following notation: "Valuation on rugs less than $75 per 100 pounds." The rugs in the transit were much damaged by acid and were said to be worth but $5 apiece after the damage. The shippers claim that their value when shipped was $95 apiece. Under the valuation noted on the bill of lading, their value could not have exceeded $60 because each rug weighed 40 pounds.

The Texas Court of Civil Appeals, which was the highest court to which the case could be brought (because the Supreme Court of Texas held that it had no jurisdiction), relied upon Article 708 of the Revised Statutes of Texas, which provides that railroad companies within the State shall not limit or restrict their liability, as it existed at common law, by any general or special notice, or by inserting exceptions in the bill of lading, or by memorandum given upon the receipt of the goods for transportation, or in any other manner, and that any such special agreement shall be invalid. These rugs were shipped March 13, 1920, after the second Cummins Amendment to the Interstate Commerce Act (August 9, 1916, 39 Stat. 441, c. 301), which permits to carriers a limitation of liability upon property received for transportation concerning which the carrier shall have been authorized 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 release value of the property. In such a case, such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released.

The writ of error is brought here under § 237 of the Judicial Code, on the ground that this order of the Interstate Commerce Commission fixing the classification and rates thereunder is an authority exercised under the United States which by the contention of the shippers was drawn in question, and its validity denied by the state court. *Champion Lumber Company* v. *Fisher,* 227 U. S. 445, 451. It is not disputed, therefore, that, if the order of the Interstate Commerce Commission and the Western Classification No. 56 apply, the judgment of the Court of Civil Appeals of Texas should be reversed; if Article 708 R. S. of Texas applies, the judgment should be affirmed.

The *Shreveport Case* began by an application of railway carriers running west from Shreveport across the Texas State line to Houston and Dallas, to set aside an order of the Interstate Commerce Commission, on the ground that it exceeded its authority. The order was made in a proceeding initiated by the Railroad Commission of Louisiana before the Commission. The complaint in that proceeding was that the carriers maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and that the carriers, in the adjustment of their rates over their respective lines, discriminated in favor of traffic within the State of Texas and against similar traffic between Shreveport and Texas points; that Shreveport competed in business with Houston and Dallas, and that the rates from Dallas and Houston east to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points, with conditions similar in all respects. The difference was substantial, and injuriously affected the commerce of Shreveport. The Commission found that interstate rates out of Shreveport to main Texas points were unreasonable, and it fixed maximum rates for that traffic. It also found that the rates from Houston and Dallas

eastward to Texas points were so low as to be a discrimination and an undue and unlawful preference against Shreveport and against its interstate commerce. Accordingly, the carriers were directed to desist from charging higher rates from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the same carriage from Dallas and Houston to Shreveport for equal distances. The Commerce Court sustained the order, and so did this Court, leaving it to the Railroad Company to bring about the equality required either by decreasing the rates from Shreveport to the Texas points between that city and Dallas and Houston, or by increasing the intrastate rates from Houston and Dallas eastward to the Texas points between those cities and Shreveport. This Western Classification, which the carrier applied in this case, was adopted by the railroads under the authority of the Interstate Commerce Commission thus sustained in the *Shreveport Case*. That authority rested on the supremacy of federal authority in respect to interstate commerce. The intrastate rates fixed by the Texas State Railway Commission from Houston and Dallas eastward to Texas points were a discrimination against the interstate traffic between Shreveport and those same points; and, therefore, it was held to be within the power of the Interstate Commerce Commission, in preventing such unlawful discrimination under the Interstate Commerce Act, to direct the railways to ignore the Texas Commission rates and to establish rates, not unduly discriminating against interstate commerce, in intrastate traffic. Such an order, of course, included classification as well as rates. The two are so bound together in the regulation of interstate commerce that the effect of both must be reasonable and without undue discrimination. The Interstate Commerce Commission, therefore, had full authority to issue this order for the adoption of the Western Classification

for intrastate points between Houston and Cisco, both in Texas. The conflict between the Revised Statutes of Texas and the order of the Interstate Commerce Commission can only be settled by recognition of the supremacy of the federal authority. It is plain from the agreed statements of facts that the only recovery which could be had under the Western Classification in this case was less than $60. The limitation of liability was in accordance with the second Cummins Amendment, was properly agreed to, and was binding upon the shipper as well as the carrier.

The judgment of the Court of Civil Appeals must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BROOKS *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 286. Argued January 30, 1925.—Decided March 9, 1925.

1. The Act punishing the transportation of stolen motor vehicles in interstate or foreign commerce is within the power of Congress. P. 436.
2. The third section of this act punishes anyone who transports or causes to be transported, in interstate or foreign commerce, a motor vehicle, knowing it to have been stolen, and the fourth section punishes the acts of receiving, storing, concealing, disposing of, etc., "any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen." *Held*, that § 4 is constitutional, since its purpose is merely to make more effective the regulation of § 3 and it applies only where the act of storing, concealing, etc., is a final step in the use of interstate (or foreign) transportation to promote the scheme of unlawfully disposing of the stolen vehicle and of withholding it from its owner. P. 439.
3. When the constitutional question upon which a writ of error from this court to the District Court was founded is decided against

the plaintiff in error, non-federal questions arising in the record must also be decided. P. 439.

4. In an indictment charging that defendant, knowingly, unlawfully and feloniously transported and caused to be transported in interstate commerce, between places designated, a touring automobile, (stating its value) the property of A, which said automobile theretofore (stating a time) had been stolen from A, and that the defendant did not have A's consent to transport it between the places named, "all of which he," the defendant, "then and there well knew," the concluding allegation of scienter is to be applied to the whole narrative preceding; so that the charge that defendant knew, when he transported it, that the automobile was stolen, is sufficiently definite. P. 439.
5. Where a defendant is convicted, by a general verdict, upon several counts of an indictment, and is given the same term of imprisonment under each count, to run concurrently, error in the court's charge, applicable to only one of the counts, is not ground for reversing sentence on the others. P. 440.

Affirmed.

ERROR to judgment and sentence imposed by the District Court for violation of the "National Motor Vehicle Theft Act."

Mr. Joe Kirby for plaintiff in error.

The indictments fail to inform the accused of the nature and cause of the accusation, under Article 6, and seek to deprive him of his liberty without due process of law contrary to Article 5, of the Bill of Rights.

The first counts charge Brooks with knowingly transporting the vehicle and not with transporting a vehicle known by him to have been stolen. Probably nothing is more elementary in criminal law than that the charge in the indictment must be positive, direct, certain and specific, must cover every act necessary to constitute the crime sought to be charged and that nothing can be added by inference or intendment and meet the constitutional requirements. In other words, there must be an accusation, not a dragnet. 1 Chitty C. L. Page 171; 1 Bish. N. C. P. §§ 508–520; 1 Wharton C. P. (Kerr)

§ 194. The same criticism applies to the second count. This guilty knowledge must have been in the mind of the defendant under the first count at the time he transported the car and under the second count at the time he stored or concealed it. It should have been, but has not been, alleged in the indictment. *Peterson* v. *United States,* 213 Fed. 920; *Fredericks* v. *Tracy,* 33 Pac. (Calif.) 750; *Sir Nicholas Pointz,* Cro. Jac. 214; *United States* v. *De Barre,* 6 Biss. 358; 2 *Bishop* N. C. L. § 1140; *Foster* v. *State,* 106 Ind. 272.

The National Motor Vehicle Theft Act is not authorized under the commerce clause of the Constitution and is in conflict with Art. 10 of the Constitution. *Dobbins* v. *Comm'rs.,* 16 Pet. 435 *Buffington* v. *Day,* 11 Wall. 113. The Act in question does not regulate interstate commerce. *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Hammer* v. *Dagenhart,* 247 U. S. 251. When this Court upheld the constitutionality of the White Slave Law, *Hoke* v. *United States,* 227 U. S. 308; the Pure Food and Drug Act, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; and the Anti-Lottery Act, *Champion* v. *Ames,* 188 U. S. 321, it went to the very extreme limit.

Even if Congress possessed the power to enact § 3 of the act in question, still there must be some point in the procedure where this interstate control will cease, where the State can again assume jurisdiction over the vehicle. In interstate commerce this has been, we believe, always determined by the article reaching its primary destination. In the present case, the destination in the movement of the cars was the defendant's garage in Sioux Falls. Whatever was done with the cars after they reached their destination in interstate movement would be clearly beyond the federal jurisdiction and a question solely for the state courts. In fact we think a careful reading of § 4 will disclose that such was the purpose of Congress. By the act of June 3, 1902, 32 Stat. 285, Congress sought to assume jurisdiction over migratory and

insectivorous birds. In *United States* v. *McCullagh,* 221 Fed., 288, the District Court held the act unconstitutional, pointing out that the power to pass such an enactment was not conferred either by the general welfare clause or by the interstate commerce clause. The same view was strongly expressed in *State* v. *Sawyer,* 113 Me. 458.

The court below also erred in excluding the wife of the defendant, when called as a witness for the purpose of contradicting and impeaching the testimony of the government witnesses, whose statements were given in her presence. *Johnson* v. *United States,* 293 Fed. 383; *Jin Fuey Moy* v. *United States,* 254 U. S. 189; *Rosen* v. *United States,* 245 U. S. 467; *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U. S. 263; *Benson* v. *United States,* 146 U. S. 325; *Adams* v. *United States,* 259 Fed. 214; Wigmore on Evidence § 601.

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

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

This is a writ of error to the District Court for the District of South Dakota brought by Rae Brooks to reverse a judgment against him of conviction under two indictments for violation of the Act of Congress, of October, 1919, known as the National Motor Vehicle Theft Act. The writ of error issued under § 238 of the Judicial Code, because the case involves the construction or application of the Constitution, in that the chief assignment of error is the invalidity of the Act. The Act became effective October 29, 1919 (41 Stat. 324), and is as follows:

"Chap. 89.—An Act to punish the transportation of stolen motor vehicles in interstate or foreign commerce.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the National Motor Vehicle Theft Act.

"Sec. 2. That when used in this Act:

"(a) The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails;

"(b) The term 'interstate or foreign commerce', as used in this Act shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

"Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.

"Sec. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender."

The objection to the Act can not be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public,

within the field of interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 215. In *Reid* v. *Colorado,* 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other States. In the *Lottery Case,* 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other States than the one from which they were transported, would deceive or injure persons who purchased such articles. In *Hoke* v. *United States,* 227 U. S. 308 and *Caminetti* v. *United States,* 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating liquors into any State in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the State. In *Weber* v. *Freed,* 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the State of destination.

In *Hammer* v. *Dagenhart*, 247 U. S. 251, it was held that a federal law forbidding the transportation of articles manufactured by child labor in one State to another was invalid, because it was really not a regulation of interstate commerce but a congressional attempt to regulate labor in the State of origin, by an embargo on its external trade. Articles made by child labor and transported into other States were harmless, and could be properly transported without injurying any person who either bought or used them. In referring to the cases already cited, upon which the argument for the validity of the Child Labor Act was based, this Court pointed out that, in each of them, the use of interstate commerce had contributed to the accomplishment of harmful results to people of other States, and that the congressional power over interstate transportation in such cases could only be effectively exercised by prohibiting it. The clear distinction between authorities first cited and the *Child Labor Case* leaves no doubt where the right lies in this case. It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture, have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other State, and their sale or other disposition far away from the owner and his neighborhood, have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction

and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.

The fourth section merely makes more effective the regulation contained in the third section. The third section punishes the transportation of a stolen automobile with knowledge of the theft. The fourth section punishes the receipt, the concealment, the storing, the bartering, the sale, or the disposition of such stolen vehicle, moving as interstate commerce, or as a part thereof, with knowledge of its having been stolen. Of course, this section can and does apply only to the storing or concealment of a stolen automobile with knowledge of its theft, as a final step in the use of interstate transportation to promote the scheme of its unlawful disposition and the withholding of it from its owner. For these reasons, we think that §§ 3 and 4 are within the power of Congress.

The constitutional question brought this case directly to this Court. Being here, the other questions arising on the record must be decided. *Pierce* v. *United States,* 252 U. S. 239; *Brolan* v. *United States,* 236 U. S. 216.

It is objected that the counts of the indictments failed to inform the defendant of the nature and cause of the accusation. There were two indictments with two counts each. One charged violation of § 3 in the first count and of § 4 in the second count, as to one automobile. The second indictment made the same charges as to a second automobile. The charge in one, under § 3, was that defendant "knowingly, unlawfully and feloniously did transport and cause to be transported in

interstate commerce" from Sioux City, Iowa, to Sioux Falls, South Dakota, a touring automobile, describing it as of $1,000 value, the property of and belonging to one W. C. Wendt of Omaha, Nebraska, which said automobile theretofore, on September 7th, A. D. 1921, had been stolen from Wendt, and that the defendant did not have the consent of the owner to transport it from Sioux City to Sioux Falls, "all of which he, the said Rae Brooks, then and there well knew." The argument is that this does not sufficiently charge that the defendant knew that the automobile was stolen when he transported it. We think it does; that it is a reasonable construction to hold that the last words refer to the whole previous narration.

The third objection is that there is no evidence of the defendant's guilt, and that the jury should have been so advised. We have read the evidence and read the charge of the court. The charge of the court submitted the issues properly to the jury except possibly in one respect, to which we shall refer.

It appeared that Brooks, the defendant, owned a garage in Sioux Falls, South Dakota, and that he went to Sioux City, Iowa, and obtained these two automobiles, which had been stolen, and transferred them to Sioux Falls. We can not say that the circumstances were not such that a jury might properly infer that the defendant knew that they were stolen and had acquired them and transported them to South Dakota for the purpose of profiting by the transaction in stolen goods. It is said that there was no evidence after the cars were stored in Sioux Falls that the defendant made any effort to secrete, conceal or store them with guilty knowledge. It is not necessary for us to examine into this question or another mooted by the defendant's counsel. He contends that under the charge of the court the jury might have been led to convict the defendant on the second count in each indict-

ment, on the theory that he became aware of the stolen character of the cars only after he reached Sioux Falls, and stored them after he became aware of their stolen character in Sioux Falls. This, he says, was an erroneous application of the 4th section, because, if his connection with the transportation was innocent, his subsequent criminal concealment of the stolen property would be disconnected with interstate commerce and be only a crime against the State. We do not think it necessary to pass on this question, for the reason that the verdict of the jury was general, that the defendant was found guilty on both the counts of each of the two indictments and that the defendant was sentenced to eighteen months on each indictment and each count, the sentences to run concurrently. As the convictions can be sustained on the first count in each indictment under the verdict, there is no ground for reversing the case because of error in charging as to the second count. *Claassen* v. *United States,* 142 U. S. 140, 146; *Evans* v. *United States,* 153 U. S. 608, 609; *Abrams* v. *United States,* 250 U. S. 616, 619; *Pierce* v. *United States,* 252 U. S. 239, 252.

There are some objections made to the form of some questions put by the District Attorney. We do not think they are shown to have been sufficiently prejudicial to justify a new trial.

The judgment of the District Court is

Affirmed.

BARCLAY & COMPANY, INCORPORATED *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK.

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

No. 547. Argued November 24, 1924.—Decided Dec. 15, 1924.

1. The taxation by Congress of the income of domestic corporations derived from sale abroad of goods bought or made by them in this country is not a tax on exports; nor does it violate due process of law because a like tax is not imposed on the income similarly derived by foreign corporations. *National Paper Co.* v. *Bowers,* 266 U. S. 373. P. 447.
2. The exemption of foreign corporations is equally valid whether complete or only partial. Revenue Acts of 1918 and 1921 considered. P. 448.
3. The power of Congress in laying taxes is very wide; and the Fifth Amendment does not apply to discrimination between taxpayers based on a classification that is not arbitrary and capricious, but reasonable. P. 450.

ERROR to a judgment of the District Court dismissing an action to recover money paid under protest as a federal income tax. The case here (547) was first decided on December 15, 1924, upon authority of *National Paper & Type Co.* v. *Bowers,* No. 320, decided on the same day and reported in 266 U. S. 373. Due to a motion for rehearing, the opinion was withheld from publication. It is now printed, following the opinion overruling the motion.

Mr. P. J. McCumber, with whom *Mr. Franklin Grady* and *Mr. Homer Sullivan* were on the briefs, for plaintiff in error.

The assessment and collection of the alleged tax was not the exertion of the power of taxation but a confiscation

of property, in violation of the Fifth Amendment. See 32 Op. A. G. 336; *Sulley* v. *Attorney General,* 5 H. & N. 711; *State ex rel. Manitowoc Gas Co.* v. *Wisconsin Tax Comm.,* 161 Wis. 111; *St. Clair* v. *Cox,* 106 U. S. 350; *Zambrino* v. *Galveston Ry.,* 38 Fed. 449; *De Beers* v. *Howe,* 5 B. T. C. 198; *Goerz* v. *Bell,* 2 K. B. 136; Corpus Juris, Vol. 14A, § 3945. Congress recognizes that foreign corporations transacting business within the United States, are resident in the United States, by referring in par. 1 of § 217 (a) of the Revenue Act of 1921 (42 Stat. c. 136) to such foreign corporations as "resident foreign corporations."

Treaty rights have been granted under which foreign corporations carry on business in the United States.

Income from the business of manufacturing goods in one jurisdiction and selling them in another is taxable at the place of manufacture, *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Shaffer* v. *Carter,* 252 U. S. 37. The income of foreign corporations, from goods manufactured by them within the United States and exported and disposed of or sold in foreign countries, was earned within the United States.

It is clearly established that discrimination in taxation which is made to depend on nationality or allegiance, is arbitrary, oppressive or capricious, and hence in violation of the "due process of law" provision of the Fifth Amendment: See Cooley on Taxation, (3d & 4th eds. p. 23); Cooley's Const. Limit's. pp. 707, 708 and 723; *Dent* v. *West Virginia,* 129 U. S. 114; *Am. Sugar Ref. Co.* v. *Louisiana,* 179 U. S. 91; *Lappin* v. *District of Columbia,* 22 App. D. C. 68; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1. It is submitted that it would be impossible to draft a law taxing income which would be more "wanting in basis for classification" or wherein any more "gross and patent inequality" in taxation would result

than that which is complained of here. Compared with the competing foreign corporations the occupation is the same, the circumstances and conditions under which this competition is carried on are identical; and hence it would be impossible to discriminate against the plaintiff in error in this case without basing the classification on nationality or allegiance, or something equally arbitrary and capricious, which is precisely what this Court has said Congress cannot do without thereby taking property contrary to due process of law. The fundamental principle is equality in application of the law. *Truax* v. *Corrigan,* 267 U. S. 334; *Hurtado* v. *People of California,* 110 U. S. 516; *Smyth* v. *Ames,* 169 U. S. 466; *Hayes* v. *Missouri,* 120 U. S. 68.

The due process of law principle applies to income taxes with respect to a situation like that of the plaintiff in error. *Shaffer* v. *Carter,* 252 U. S. 37, 54, holds in effect that the due process clause of the Fifth Amendment restricts Congress to the condition that taxes on income derived from the business of manufacturing for export and exporting, in order to be valid, must be imposed equally on all persons under like circumstances and conditions. That the tax discrimination against plaintiff in error violates due process of law, see *Raymond* v. *Chic. Union Tract. Co.* 207 U. S. 20; *Truax* v. *Raich* 239 U. S. 33. It cannot be seriously suggested that a discrimination which violates this clause when it is directed against the alien does not violate the clause when directed against the citizen. To so contend would be equivalent to asserting that Congress has power to force American citizens to expatriate themselves in order to "obtain support in the ordinary fields of labor" or to protect their property in the United States from injury or confiscation. See *Slaughter House Cases,* 111 U. S. 746, 757; *Soon Hing* v. *Crowley,* 113 U. S. 703, 709; *Heisler* v. *Thomas Colliery Co.* 260 U. S. 245, 255; *Sou. Ry. Co.* v. *Greene,* 216 U. S.

400, 418; *Flint* v. *Stone Tracy Co.* 220 U. S. 142, 161; *Western Union Tel. Co.* v. *Frear,* 216 Fed. 199, 202.

Peck v. *Lowe,* 247 U. S. 165, declared that the status of the net income from exporting and selling abroad "is not different from that of the exported articles prior to the exportation". It is evident that if such net income did not have this status, it would necessarily be related to the activities of exporting, and hence to tax it would be in violation of par. 5, of § 9 of Article I of the Constitution. That a tax on such net income, irrespective of whether the goods are sold within or without the State, is like a tax on property in the State, is held by this Court in *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, and in *Underwood Typewriter Co.* v. *Chamberlain, supra;* and is confirmed in *Shaffer* v. *Carter, supra.* Hence, if Congress is not restrained by the "due process of law" clause of the Fifth Amendment from making the discrimination in favor of foreign corporations which is here complained of Congress would not be restrained from making a discrimination exempting foreign corporations from the payment of customs duties on articles imported into the United States while imposing such duties on American corporations; or from making a discrimination exempting foreign corporations from the taxes paid by manufacturers, producers, and importers on domestic sales, while imposing such taxes on sales by American corporations; or from making a discrimination exempting foreign corporations in the business of insurance, or banking, or building, or any other business in the United States, from income or profits tax, or capital stock tax, or any other sort of tax which Congress can impose, while levying such tax upon American corporations engaged in like business.

The tax constituted a direct burden on and impediment to plaintiff in error's business of exporting, in violation of par. 5 of § 9 of Article I of the Constitution. *Peck* v.

Lowe, supra. See *Darnell & Son* v. *Memphis,* 208 U. S. 113; *Woodruff* v. *Parham,* 8 Wall. 123; *Brown* v. *Houston,* 114 U. S. 622; *United States Glue Co.* v. *Oak Creek, supra.* It is to be noted that the law under which the tax was assessed, known as the Revenue Act of 1918 (40 Stat. c. 18) provided in § 213 (c) that nonresident alien individuals should have the same exemption that was granted to foreign corporations by § 233 (b) of that act with respect to income derived from the business of exporting carried on in the United States. It is well known in commercial circles that there are many firms or partnerships engaged in the exporting business in the United States which are composed of alien individuals, of whom nearly all are nonresident aliens.

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

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

On December 15, 1924, Mr. Justice McKenna delivered the opinion of this Court in the case of the National Paper and Type Company against Frank K. Bowers, Collector, [266 U. S. 373] No. 320 of the present Term. That case was heard at the same time with this. They were suits to recover taxes which it was claimed had been illegally collected, for the reason that the statutes under which they had been exacted deprived the taxpayers of their property without due process of law. The statute attacked in No. 320 was the income tax of 1921, that in this case was the income tax of 1918.

The plaintiffs in the two cases were corporations of this country engaged in the business of the purchase and manufacture of personal property within the United States, and the sale thereof without the United

States. Their objection to the taxes, both of 1921 and of 1918, was that they were subjected to a tax on all of their net income, including profits made by them in the sale of their goods abroad, while foreign corporations, engaged in the same business of buying and manufacturing goods in this country and selling them abroad, were not taxed upon their whole net income but were exempted from a tax on all or a part of it.

Another objection to the tax was that the tax in both instances was a tax on exports. That was disposed of by this Court in opinion No. 320 by reference to the case of *Peck & Company* v. *Lowe,* 247 U. S. 165.

The Court further pointed out that, in respect to what was called discrimination in favor of foreign corporations, Congress might adopt a policy calculated to serve the best interests of this country in dealing with citizens or subjects of another country and might properly say, as to earnings from business begun in one country and ending in another, that the net income of foreign subjects or citizens should be left to the taxation of their own government or to that having jurisdiction of the sales; that the question of taxing foreign corporations on such income might properly be affected by the consideration that domestic corporations had the power of the United States to protect their interests and redress their wrongs in whatever part of the world their business might take them, while the foreign corporations must look to the country of their origin for protection against injury or redress of losses occurring in countries other than the United States. Having disposed of No. 320 for these reasons in favor of the Government, by affirming the judgment below, a short opinion was delivered by Mr. Justice McKenna in No. 547, in which he said that the charge of invalidity in that case was on the same grounds as those set up in No. 320; and that, upon authority of the decision in No. 320, the judgment should be affirmed.

A petition for rehearing seeks now to differentiate the present case from that considered and decided in No. 320.

The Revenue Act of 1918, 40 Stat. 1076, provided for a tax of 12 per cent. on the net income in excess of certain credits upon domestic corporations, but contained this provision in case of foreign corporations, under § 233 (b):

"In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture and disposition of goods within the United States." (40 Stat. 1077.)

The Revenue Act of 1921 taxed the net income (meaning the gross income, less certain deductions) of domestic corporations. 42 Stat. 252, 254. The same section, No. 232, provided that "In the case of a foreign corporation, the computation should be made in the manner provided in § 217. The relevant parts of §§ 217 and 233 were as follows:

"Sec. 217 (a). That in the case of a non-resident alien individual or of a citizen entitled to the benefits of section 262. . . .

"(e) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (a) and (c), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary. . . . Gains, profits and income from (1) transportation or other services rendered partly within and partly without the United States, or (2) from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer

without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold. . . . (42 Stat. 243, 244, 245.)

"Sec. 233. . . .

"(b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in case of insurance companies subject to the tax imposed by section 243 or 246) in the manner provided in section 217." (42 Stat. 254.)

Counsel contend in their petition for rehearing that the Revenue Act of 1921 provided, with respect to the manufacture within the United States by foreign corporations of goods which they sold in foreign countries, that the income derived should be allocated to sources within the United States, and imposed a tax on that part of such income allocated to manufacture, whereas the Revenue Act of 1918, under which this case arose, exempted from tax all income of foreign corporations derived from the manufacture or purchase of goods within the United States which they sold or disposed of in foreign countries. But we do not think that that distinction makes any difference in the application of the principle upon which the judgment in No. 320 was based. Whatever the difference between the acts, whether the foreign corporations were wholly exempted or only partially exempted, they constituted a class all by themselves and could be properly so treated by Congress because of the considerations suggested in the opinion in No. 320. The attack made upon the law of 1921 for discrimination against American corporations in favor of foreign corporations was quite as

vigorous in the briefs of counsel for the plaintiffs in error in No. 320 as in No. 547, and rested on the same argument; and while the exemption of the net income of foreign corporations from manufacture in United States did not exist in the Act of 1921 as in the Act of 1918, the question of discrimination in the two cases only differed in extent and did not call for any real distinction in deciding them. The question where an income is earned is always a matter of doubt when the business is begun in one country and ended in another. As pointed out by the plaintiff in error in his brief in No. 320, much of the business in such foreign trade in addition to the manufacture is done in the United States in storehouses and docks and in other ways after the manufacture, but whatever of that might be equitably allocated as done in the United States is exempted from taxation of foreign corporations by the Act of 1921. Thus exactly the same question presents itself as in No. 320. It is only a difference in degree.

The power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is reasonable, and not merely arbitrary and capricious, the Fifth Amendment can not apply. As this Court said, speaking of the taxing power of Congress, in *Evans* v. *Gore,* 253 U. S. 245, 256: "It may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. *McCulloch* v. *Maryland,* 4 Wheat. 316, 431; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, 443; *Austin* v. *The Aldermen,* 7 Wall. 694, 699; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541, 548; *Knowlton* v. *Moore,* 178 U. S. 41, 92, 106; *Treat* v. *White,* 181 U. S. 264, 268–269; *McCray* v. *United*

States, 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *Billings* v. *United States,* 232 U. S. 261, 282; *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 24–26."

The power of Congress to make a difference between the tax on foreign corporations and that on domestic corporations is not measured by the same rule as that for determining whether taxes imposed by one State upon the profits of a manufacturing corporation are an imposition of tax upon a subject matter not within the jurisdiction of the taxing State. Cases on that subject like *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, have no application to the question here. Considerations of policy toward foreign countries may very well justify an exemption of the foreign corporations from taxes that might legitimately be imposed on them, but which Congress does not think it wise to exact. Such considerations justify a different classification of foreign corporations doing business in the United States, either of manufacture or of purchase, and making profit out of that business in other countries, from that which would apply to its own corporations. The injustice thought to be worked upon domestic corporations engaged in sales abroad, by a different classification, for purposes of taxation, of foreign corporations similarly engaged, is an argument, not for the constitutional invalidity of the law before a court, but for its repeal before Congress.

The opinion of Mr. Justice McKenna applying the same principles in this case to those applied in No. 320 was entirely justified, and the petition for rehearing is

Overruled.

The original opinion is as follows:

Mr. Justice McKenna delivered the opinion of the Court.

The plaintiff in error is a domestic corporation engaged in business as a manufacturer. It is subjected to

an income tax from which foreign corporations are exempted. It charges invalidity on the same grounds as those set up in No. 320, [266 U. S. 373,] and brought suit to recover the amount of the tax. Its complaint was dismissed on motion of the District Attorney upon the authority of *National Paper & Type Company* v. *Edwards, Collector of Internal Revenue,* 292 Fed. 633, and judgment went on the merits.

The cause was submitted with No. 320, just decided. It presents the same contentions, based upon the same grounds. And upon the authority of our decision in that case, the judgment below is

Affirmed.

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

IN EQUITY.

No. 13, Original. Decree entered March 9, 1925.

Decree reciting and confirming the report by commissioners of the survey, location and marking of a part of the boundary between Texas and Oklahoma, along the Fort Augur Area; adjudging that the line shown by the report and maps be established as the true boundary between the two States along the part of Red River so designated, subject to future changes by erosion and accretion; and directing transmission of authenticated copies of the decree and maps to the chief magistrates of the two States.

Announced by Mr. Justice Van Devanter: [1]

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

[1] Other orders in the case of this date will be found among the *per curiam* decisions, *post,* pp. 580, 582.

that they have run, located and marked the portion of such boundary along the Fort Augur Area—such report being as follows:

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

"Continuing our work as commissioners designated in the decree of March 12, 1923 (261 U. S., 340), 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 from the Big Bend Area westward to a southerly extension of the west line of range sixteen west in Oklahoma, in accordance with the decree and the principles announced in the opinion delivered January 15, 1923 (260 U. S., 606), and in the manner stated in our report of April 25, 1924 on the Big Bend Area. We have called this portion of the boundary the 'Fort Augur Area.'

"The maps, which accompany and are made a part of this report, are identified as follows:

Map No. 4: Cadastral Map of the Texas and Oklahoma Boundary, Fort Augur Area, scale 2,000 feet to the inch;

Map No. 5: Topographic Map of Texas and Oklahoma Boundary, Fort Augur Area, in four sheets, Nos. 1, 2, 3 and 4, scale 500 feet to the inch, contour interval 2 feet; and, a

Road Map: Showing location of Reference Monuments, scale one mile to the inch.

"There are no oil wells within three hundred feet of the boundary in the Fort Augur Area.

"The survey of this area was begun June 13, 1923, and completed October 10, 1924, the triangulation being done in 1923 and the other work being done after June 1, 1924.

"The location of the boundary, reported herein, is that position which existed on September 3, 1924.

"The field notes of the boundary survey and tabulations of technical data follow: [2]

"Five copies each of the report and maps have been today sent by registered mail to the Attorney General of the United States, the Attorney General of Texas and the Attorney General of Oklahoma. We have also 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: Road Map showing location of Reference Monuments; Map No. 4; and, Map No. 5, Sheets Nos. 1, 2, 3 and 4.

"Respectfully submitted,

"ARTHUR D. KIDDER,
"ARTHUR A. STILES,
"*Commissioners.*

"Washington, D. C., January 5, 1925."

And no objection or exception to such report being presented, although the time therefor has expired;

It is now adjudged, ordered and decreed that the said 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

[2] The field notes and tabulations, covering 30 pages of the report, are here omitted; as are also the maps. Copies of these matters, when desired, may be obtained in the Clerk's Office; or in the offices of the Chief Executives of the States of Oklahoma and Texas.

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.

SANFORD & BROOKS CO. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 175. Argued January 15, 1925.—Decided March 9, 1925.

1. Where a Government contract for dredging expressly required prompt, written protest against any order for work outside the specifications, written modification of the contract if altered materially, and written orders for extra work, *held* that oral protests by the contractor, a claim for additional compensation and a favorable advisory opinion thereon by a government official, were insufficient to establish that these contract provisions were inapplicable or waived, or that a new, oral agreement for compensation *quantum meruit* was substituted by implication. P. 457.
2. A motion to remand to the Court of Claims for further findings should be submitted at the first term of the entry of the case so that the Court may determine whether the motion shall be passed upon in advance, or postponed until the hearing on the merits. P. 458.

58 Ct. Cls. 158, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for additional compensation for dredging.

Mr. William L. Marbury, with whom *Mr. Horace S. Whitman* and *Mr. Charles Clagett* were on the brief, for appellant.

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

Mr. Justice Brandeis delivered the opinion of the Court.

Sanford & Brooks Co. agreed with the United States to dredge a channel at a fixed rate per cubic yard of material dredged. Payment for the number of yards dredged was made at the contract rate. Later, this suit was brought to recover additional sums, as upon a *quantum meruit*. One claim was that the material to be removed within the contract lines had been misdescribed in the specifications; and the rule applied in *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1, and *United States* v. *Spearin,* 248 U. S. 132, was invoked. Another claim was that, through a mistake of the Government's representative, work had been done outside the limits prescribed by the contract, and that this was more burdensome. The Court of Claims, after a hearing upon the evidence, entered judgment for the defendant. 58 Ct. Cls. 158. The case is here on appeal under § 242 of the Judicial Code. The appeal was filed in this Court on September 20, 1923. It was not reached for argument until January 15, 1925. On January 9, 1925, the plaintiff filed, with its brief on the merits, a motion to remand. The document, including appendices, contained 65 printed pages.

The reliance in this Court was wholly upon the motion to remand. The claim on account of work inside the contract lines was not insisted upon here. The claim for work outside the contract lines was urged in the brief on the merits, but at the argument plaintiff conceded that, upon the findings of fact made, there could be no recovery. The contention then presented was that this Court could not come to a proper decision on

this claim without having findings as to the existence or non-existence of eight additional alleged facts; and that to this end the cause should be remanded to the lower court. The Government objected to the allowance of the motion to remand on the grounds that the findings already made were definite; that they included all material facts; and that, if the additional facts asserted were found, these would not change the legal result. The objections are, in our opinion, sound.

Plaintiff asserts that the additional findings would show that, when the erroneous location of the work was discovered, it made oral protest to the contracting officer of the Government against continuance of the work outside the contract lines; that it protested orally against payment for such work at the contract price; that, during the progress of the work, it made claim for payment upon a *quantum meruit* basis; that, seven months after the completion of the work in question, the Judge Advocate General gave an opinion on this claim favorable to the plaintiff; that the Assistant Secretary of War approved of the opinion; that he directed that negotiations be had with plaintiff concerning the amount of additional compensation to be paid; but that no agreement was reached. These, with other minor additions to the facts as found, are relied upon by plaintiff to show that, as to this work, the express provisions in the written contract which required prompt written protest against any order for work outside of the specifications, written modification of the contract if it was altered materially, and written orders for extra work, were all inapplicable or waived; and that a new oral agreement providing for compensation *quantum meruit* was substituted by implication. We are of opinion that the findings sought, if made, would be of no avail to plaintiff. Oral protests, a claim for additional compensation and a fa-

vorable advisory opinion thereon, would be facts clearly insufficient to establish plaintiff's contentions.

Moreover if those facts could conceivably affect the result, the motion should, as a matter of discretion, be denied because of the delay in filing it. A motion to remand for further findings, even if based wholly upon matter included in the original record on appeal, should be submitted at the first term of the entry of the case so that this Court may determine whether the motion shall be passed upon in advance of the hearing on the merits or be postponed until such hearing. Compare *United States* v. *Adams,* 9 Wall. 554, 559. Where, as in this case, the motion is based largely upon matter not appearing in the record on appeal, the reasons for insisting upon promptness in making an application to remand are particularly persuasive. Diligence in this respect is essential to the orderly and expeditious administration of justice. Compare Rule 14 of this Court governing petitions for certiorari for diminution of the record. *Chappell* v. *United States,* 160 U. S. 499.

Affirmed.

HOROWITZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued October 15, 1924.—Decided March 9, 1925.

1. The United States, when sued as a contractor, can not be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. P. 460.
2. So *held,* where the Government, having sold silk to the claimant, did not ship it promptly, owing to an embargo placed on freight shipments of silk by the United States Railroad Administration, so that the claimant lost his opportunity to resell at a profit.

58 Ct. Cls. 189, affirmed.

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

Mr. Raymond M. Hudson for appellant.

Mr. M. E. Otis, Special Assistant to the Attorney General, for the United States. *Solicitor General Beck, Assistant Attorney General Ottinger,* and *Mr. Wm. M. Offley,* Special Assistant to the Attorney General, were on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by Horowitz, under the Tucker Act,[1] to recover damages for the alleged breach of a contract relating to the purchase of silk from the Ordnance Department. The petition was dismissed, on demurrer, for failure to state a cause of action. 58 Ct. Cls. 189.

The petition alleges, in substance, these facts: On December 20, 1919, the claimant, a resident of New York, submitted a bid for certain Habutai silk offered for sale by the New York Ordnance Salvage Board. At that time the "Chief of the Textile Division of New York City," agreed, "on behalf of such Board," that the claimant would be given an opportunity to re-sell the silk before completing the payment of the purchase price, and that the "departments of the Government having jurisdiction in matters of this kind" would ship the silk—which was then in Washington—within a day or two after shipping instructions were given. On December 22 he was notified by the Board that the sale of the silk to him had been "approved"; and he thereupon paid part of the purchase price. On January 30, 1920, he sold the silk to a silk company in New York. On February 16 he paid the balance of the purchase price, and wrote the Board to

[1]Act of Mar. 3, 1887, 24 Stat. 505, c. 359; Jud. Code, § 145.

ship the silk at once, by freight, to the silk company. Two days later he was notified by the Board that it had received the shipping instructions and had ordered the silk to be shipped. Thereafter the price of silk declined greatly in the New York market, until March 4. On that date the "claimant learned . . . that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up." Afterwards the Government shipped the silk to the consignee, by express. It arrived in New York "on or about March 12." The consignee then refused to accept delivery on account of the fall in prices. And "by reason of the Government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for $10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time."

The petition alleges that the claimant is entitled to recover from the United States the said sum of $10,811.84, "for and on account of the violation of the said agreement;" and prays judgment therefor.

We assume, without determining, that the petition shows a valid contract with the Salvage Board for the sale of the silk and its prompt shipment after the receipt of shipping instructions. The sole breach of this contract which is alleged is the failure to ship the silk prior to March 4, 1920. This, according to the averment of the petition, was caused by an embargo placed by the Railroad Administration on shipments of silk by freight. Neither the validity of this embargo nor its effect in delaying the shipment is challenged by the petition.

It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones Case, supra,* the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

It was upon this ground that the demurrer in the present case was sustained by the Court of Claims. We think this was correct, and the judgment is

Affirmed.

OLSON ET AL., CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF OLSON BROS. OR OLSON & OLSON *v.* UNITED STATES SPRUCE PRODUCTION CORPORATION.

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

No. 128. Argued March 5, 6, 1925.—Decided March 16, 1925.

1. Where a federal statute excludes jurisdiction in state as well as federal courts, a judgment of a District Court dismissing the case for that reason is not reviewable here directly under Jud. Code § 238. P. 467.
2. The Dent Act, which provides for adjustment of certain classes of claims against the United States through the Secretary of War and by suit in the Court of Claims, did not purport to confer jurisdiction on that court over a suit against the United States Spruce Production Corporation, which, though a federal agency, is a corporation of the State of Washington. P. 466.
3. An action against the Spruce Corporation to recover for work done, materials furnished or destroyed and profits lost in consequence of a government requisition prior to the Dent Act, *held* within the jurisdiction of the state court and of the District Court on removal, whatever the merits. *Id.*

Reversed.

ERROR to a judgment of the District Court dismissing an action for want of jurisdiction as a federal court.

Mr. O. A. Neal, with whom *Messrs. R. H. Cake, John C. Murphy* and *F. R. Salway* were on the brief, for plaintiffs in error.

The United States Spruce Production Corporation is a distinct corporate entity and may be sued as any private corporation. *Sloan Shipyards Corp.* v. *Fleet Corp,* 258 U. S. 549; *The Lake Monroe* 250 U. S. 246; *Com. Finance Corp.* v. *Landis,* 261 Fed. 440; *Gould Coupler Co.* v.

Fleet Corp., 261 Fed. 716; *Lord & Burnham Co.* v. *Fleet Corp.*, 265 Fed. 955; *Bank-Russo-Asiatique of London* v. *Fleet Corp.*, 266 Fed. 897; *Ingram Day Lumber Co.* v. *Fleet Corp.*, 267 Fed. 283; *United States* v. *Salas*, 234 Fed. 842; *Panama R. R.* v. *Curran*, 257 Fed. 768; *Ingersol Rand Co.* v. *Fleet Corp.*, 187 N. Y. S. 695; *Eichberg* v. *Fleet Corp.*, 273 Fed. 886; *In re Eastern Shore Shipbuilding Corp.*, 274 Fed. 893; *American Cotton Oil Co.* v. *Fleet Corp.*, 270 Fed. 296; *United States* v. *Strang*, 254 U. S. 491; *Krichman* v. *United States*, 254 U. S. 616.

The United States Spruce Production Corporation was organized under the laws of the State of Washington, which creates it a body politic and corporate with power to sue and be sued in any court of law or equity where it may transact business. This is a statement of a power which is incidental to every corporation.

The doctrine of government immunity has but little place in this country. *United States* v. *Lee*, 106 U. S. 196; *Gould Coupler Co.* v. *Fleet Corp.*, 261 Fed. 716; *Fed. Sugar Ref. Co.* v. *U. S. Sugar Equalization Bd.* 268 Fed. 585.

Exclusive ownership of stock by the United States does not make the corporation immune from suit. *United States* v. *Strang*, 254 U. S. 491; *Salas* v. *United States*, 234 Fed. 842; *Panama R. R.* v. *Curran*, 256 Fed. 772; *Bank of U. S.* v. *Planters' Bank*, 9 Wheat. 904; *Bank of Ky.* v. *Wister*, 2 Pet. 318; *Brisco* v. *Bank of Ky.*, 11 Pet. 257.

The creation by Congress of a corporation to facilitate discharge of a governmental function does not in itself imply immunity from suit. *Osborn* v. *Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 315; *Farmers' Bank* v. *Dearing*, 91 U. S. 29; *Thompson* v. *Union Pac. R. Co.*, 9 Wall 579; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *United States* v. *Union Pac. R. Co.*, 98 U. S. 569; *Luxton* v. *North River Bridge Co.*, 156 U. S. 525.

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

The court below had no jurisdiction of the cause of action alleged. There was no attempt to allege a cause of action against the Corporation based upon any contract made by it for its own benefit or anything done by it in its corporate capacity. The cause of action set forth is under the so-called Dent Act. It is, in express terms, an action brought because the Secretary of War had rejected a claim under the Dent Act. That is its sole basis. But under that act the Court of Claims has exclusive jurisdiction, *Nassau Smelting & Refining Works* v. *United States,* 266 U. S. 101.

The only things specifically alleged to have been done by plaintiffs were prior to the 19th day of August, 1918, when the corporation was organized; and it is alleged that thereafter the corporation took over and assumed control of and undertook the work theretofore carried on or directed by the Spruce Production Division, and, acting through and by the same officers, "further promised and assured plaintiffs that they would be compensated therefor" and "thereby ratified and confirmed all that had been theretofore done and/or promised by said Spruce Production Division." The only allegations with respect to prior promises of compensation were that the plaintiffs "would be reimbursed by the Government." The case presented, therefore, is not one calling for determination of the question whether the Spruce Corporation is generally immune from suit, and such was not the basis of the decision by the court below.

As to the status of the Spruce Production Corporation, see *Clallam County* v. *United States,* 263 U. S. 341; *Erickson* v. *United States,* 264 U. S. 246. The suit is not against the corporation upon contracts made by it, in its own behalf, or upon work done for it at its request. The

suit is for compensation which agents of the War Department had promised would be paid by the Government of the United States for work done pursuant to authority conferred by acts of Congress upon the President and Secretary of War. While ordinarily the question of liability of an agent would go to the merits, rather than to the jurisdiction of the court, nevertheless, where the allegation is that the agent was an agent of the United States—a division of its War Department—that what it did was done in behalf of the United States, and pursuant to authority of acts of Congress; that its promises were of compensation to be made by the United States; and where it appears that Congress has provided a special and exclusive remedy under such circumstances, the conclusion would seem to follow that no court other than the court specified in the act of Congress has jurisdiction of the subject matter of the controversy.

Furthermore, the Dent Act waives the provision of law in favor of the United States relating to the manner prescribed for executing the agreements, and limits the liability of the United States by excluding prospective or possible profits. The United States has therefore consented to be sued in a class of cases which could not theretofore have been brought against it. It has provided for itself a special and partial defense to such claims, and has prescribed a specific court in which such matters may be litigated. No other court, therefore, has jurisdiction to entertain a suit against a Government agent based upon such a claim and subject to such a limit of liability. Looked at in this way, the question seems clearly to be one of jurisdiction.

Though the defendant named is the corporation, nevertheless the allegations themselves are to the effect that it is not the real party in interest.

The suit is a mere device to avoid the jurisdiction prescribed by Congress, and to seek a judgment, binding

upon the property of the United States, in a tribunal deemed more favorable and under circumstances less onerous. It appearing, therefore, that the suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court," it was properly dismissed. Judicial Code, § 37.

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here directly from the District Court by a writ of error and a certificate that the action was dismissed upon the ground that the Court had no jurisdiction.

The suit was begun in a Court of the State of Oregon and removed. It was brought against the corporation described in *Clallam County* v. *United States,* 263 U. S. 341, to recover for work done, materials furnished or destroyed, and profits lost, during the year 1918, in consequence of a requisition by the Government that the plaintiffs should devote their logging camp to the production of airplane timber alone. The declaration is long and suggests throughout an effort to state a case under the Dent Act, March 2, 1919, c. 94; 40 Stat. 1272; and to account for this suit by the fact that the plaintiffs' claim under that Act was disallowed. The assurances and promises relied upon seem to have been the assurances and promises of successive agents of the United States that the United States would pay for what the plaintiffs were asked to do.

The Court below seems to have regarded the Dent Act as giving the only remedy in cases like this, although the supposed cause of action arose before that Act was passed; and according to the certificate treated the statute as excluding jurisdiction elsewhere. If the suit were against the United States, as no Court has jurisdiction over the

United States except when it is granted, the ruling might have been correct. But this suit is against a corporation of the State of Washington, brought originally in a Court of Oregon to enforce a supposed liability in contract. Even if a statute of the United States created a bar, it would be unusual if the act went to the jurisdiction rather than to the merits, *Fauntleroy* v. *Lum,* 210 U. S. 230, 235; and if the statute went further it would be more likely to exclude jurisdiction in all other Courts rather than merely in Courts of the United States as such. If the statute excluded jurisdiction in State as well as United States Courts the case could not be certified under § 238 of the Judicial Code. *Fore River Shipbuilding Co.* v. *Hagg,* 219 U. S. 175, 178. But the Dent Act does not contemplate suits against corporations in the Court of Claims, and we perceive no ground for the ruling as certified. It well may be that the Court was right in deciding that the allegations were not sufficient to justify a suit against the corporation, and our judgment is without prejudice to a judgment dismissing the case upon the merits. But it was error to decide that there was a want of jurisdiction and therefore the judgment must be reversed.

Judgment reversed.

LEWIS *v.* ROBERTS.

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

No. 284. Argued January 29, 1925.—Decided March 16, 1925.

Under § 63a of the Bankruptcy Act, including among provable debts "(1) a fixed liability, as evidenced by a judgment . . absolutely owing at the time of the filing of the petition . .", a judgment founded on a tort (personal injuries caused by negligence) is a provable claim. P. 468.

294 Fed. 171, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals affirming a decree of the District Court which confirmed an order of a referee in bankruptcy disallowing the petitioner's claim.

Mr. H. L. Black for petitioner.

No appearance for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The petitioner, Lewis, recovered a judgment against the Montevallo Mining Company for personal injuries caused by its negligence. The Company was thereafter adjudicated a bankrupt in the Northern District of Alabama. Lewis filed in the bankruptcy proceeding a proof of claim upon the judgment. The District Court confirmed an order of the referee disallowing this claim, upon the ground that a judgment founded upon a tort was not provable in bankruptcy. This decree was affirmed by the Circuit Court of Appeals. 294 Fed. 171. The writ of certiorari was then granted. 264 U. S. 578.

This decision is in conflict with an unbroken line of decisions in other Circuit Courts of Appeals and in the District Courts. *Re New York Tunnel Co.* (C. C. A.), 159 Fed. 688, 690; *Moore* v. *Douglas* (C. C. A.), 230 Fed. 399, 401; *Re Putnam* (D. C.), 193 Fed. 464, 468. And see *Re Lorde* (D. C.), 144 Fed. 320; *Ex parte Margiasso* (D. C.), 242 Fed. 990; *In re Madigan* (D. C.), 254 Fed. 221.

We think these prior decisions were correct.

Section 63a of the Bankruptcy Act,[1] entitled "Debts which may be Proved," provides that: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judg-

[1] Act of July 1, 1898, c. 541, 30 Stat. 544.

ment . . . absolutely owing at the time of the filing of the petition. . . ." Section 1, (11) declares that the word "debt" as used in the Act shall, unless inconsistent with the context, be construed to include "any debt, demand, or claim provable in bankruptcy."

It is clear that a judgment for tort is provable under the express provisions of § 63a(1). The language is broad and unqualified. It includes "a fixed liability" evidenced by a judgment *ex delicto* as well as by a judgment *ex contractu*, and makes the one as well as the other a provable "debt." There is nothing in the language or in the context which suggests its limitation to judgments founded on debts or warrants the reading in of such a limitation.

This conclusion is confirmed by a consideration of other provisions of the Act. By § 17, as originally enacted, it was provided that: "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (2) are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another." [2] This express exception of certain judgments for torts from the "provable debts" released by a discharge, plainly indicates that Congress understood that under § 63a judgments for torts were "provable debts", and is strongly persuasive as a construction of that section.

Furthermore, if a judgment for tort is not a provable claim in bankruptcy under § 63a, it could not, under § 1, (11), be considered in determining whether one against whom an involuntary petition has been filed, is insolvent within the meaning of § 1, (15), providing that

[2] By the amendments of 1903 and 1917 the word "judgments" in clause 2 was changed to "liabilities", and other changes were made which are not here material. 32 Stat. 797, c. 487, § 5; 39 Stat. 999, c. 153.

"a person shall be deemed insolvent . . . whenever the aggregate of his property . . . shall not . . . be sufficient in amount to pay his debts." The result of this would be that a person having property in excess of his other debts could not be adjudged an involuntary bankrupt under § 3b of the Act, although owing judgments for tort exceeding the amount of his property. Clearly Congress did not intend so anomalous a result.

The trustee contends, however, that despite the broad language of § 63a(1), the decision in *Wetmore* v. *Markoe*, 196 U. S. 68, necessarily leads to the conclusion that only judgments founded in debt are provable claims. It was there held that under § 17 of the Act the arrears of alimony previously awarded to the wife of the bankrupt for the support of herself and their minor children under a final decree of absolute divorce was not a provable debt which was released by the bankrupt's discharge. The ground of the decision was that the court could look into the proceedings to determine the nature of the liability which had been reduced to judgment; that a decree awarding alimony was not in any just sense a debt which had been put into the form of a judgment, but rather the legal means of enforcing the obligation of the husband to support his wife and children which was imposed upon him by the policy of the law; and that it could not be presumed, in the absence of a direct enactment, that Congress intended that the Bankruptcy Act should be made an instrument by which the wife and children should be deprived of the support which it was the purpose of the law to enforce. It is clear that this decision rested on the peculiar and exceptional nature of a decree for alimony. There was no suggestion in the opinion that an ordinary claim *ex delicto* that had been previously reduced to judgment was not a provable debt; and we think that its reasoning neither leads to nor warrants such a conclusion.

Nor is there anything to support this conclusion in *Schall* v. *Camors,* 251 U. S. 239, which dealt solely with unliquidated claims arising in tort, not previously reduced to judgment, and held merely that such unliquidated claims, not being included in the enumeration of provable debts under § 63a, could not be liquidated and proven under the provisions of § 63b.

The decrees of the District Court and of the Circuit Court of Appeal are reversed, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

Reversed and remanded.

UNITED STATES *v.* P. LORILLARD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 319. Argued March 13, 1925.—Decided March 23, 1925.

By Rev. Stats. § 3386, as amended, a drawback on tobacco, etc., subsequently exported, on which the tax has been paid by affixing stamps before removal from the factory, is allowed "equal in amount to the value of the stamps found to have been so affixed." *Held* applicable to an additional tax on cigarettes imposed by the Act of February 24, 1919, payment of which would have been treated in practice as evidenced by the stamps already on the goods, if they had not been removed, but which, in view of their removal, took the form of a "floor tax." C. 18, Title VII, §§ 700, 702, 40 Stat. 1057, 1116. P. 473.

58 Ct. Cls. 541, affirmed.

APPEAL from a judgment of the Court of Claims allowing recovery, by way of drawback, of taxes on cigarettes, which were exported.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, for the United States. *Mr. Solicitor General Beck, Mr. Assistant Attorney General Lovett, Mr. Nelson T. Hartson,* Solicitor of Internal Revenue, and *Mr. Robert H. Littleton,* were on the brief.

Mr. M. C. Elliott, with whom *Mr. W. B. Bell* and *Mr. Forest Hyde* were on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the P. Lorillard Company to recover by way of drawback a tax paid by it upon 153,050,000 cigarettes of its manufacture exported after the tax had been paid. The Company recovered in the Court of Claims and the United States appeals. The total was $3 a thousand and was collected under successive Acts as follows. A tax of $1.25 per thousand was imposed by Rev. Sts. § 3394 and was paid in the usual way by stamps for the amount, bought and attached to the original packages before they were removed from the factory. An additional tax of 80 cents per thousand was imposed by the Act of October 3, 1917, c. 63, § 400; 40 St. 300, 312. The cigarettes had not been removed, and the Company paid the additional tax but without attaching new stamps, the practice being to treat the payment as so much added to the cost of the old ones. Then the Act of February 24, 1919, c. 18, Title VII, § 700; 40 St. 1057, 1116, in lieu of the internal-revenue taxes then imposed, raised the tax to $3 per thousand to be paid as before by attaching and cancelling stamps. By § 702, if the goods had been removed from the factory and were held for sale on the day after the Act, a 'floor tax' equal to the difference between the sum already paid and $3 was to be paid. These goods had been removed and the Company, having previously paid $2.05, paid the additional 95 cents. Between August 29 and November 21, 1919, these cigarettes were exported. By Rev. Sts. § 3386, amended, Act of March 1, 1879, c. 125, §16; 20 Stat. 347, a drawback on tobacco, &c., on which the tax has been paid by suitable stamps, &c., affixed before removal, is allowed, 'equal in amount to the value of the

stamps found to have been so affixed.' The Commissioner of Internal Revenue allowed the claim for the $2.05 paid under the two earlier Acts, but rejected that for the 95 cents paid under the last. The Court of Claims gave the Company judgment for $145,397.50, the amount of the rejected claim.

The argument for the Government stands on a strict adhesion to the letter of the statute giving the drawback and a narrow interpretation of even the letter of the Act. It contends that only the value of the stamps attached before removal from the factory can be recovered, and, while admitting that the second payment made after the stamps had been bought and attached can be taken as adding to their value, it denies that the payment of what the statute calls a floor tax, paid after removal of the goods, can be added in a similar way. But we are of opinion that the Court of Claims was right. When it is considered that at the time the Act allowing the drawback was passed the tax was collected wholly by stamps, it seems evident that Congress meant to carry the policy of the Constitution against taxing exports beyond its strict requirement and to let the event decide about the tax. In this case if the cigarettes still had been in the factory, the additional payment would have been treated as made for the stamps already on, if that fiction was necessary to secure the rebate. We see no insuperable difficulty in adopting the same device for a payment of the same amount under the same Act by the same people for the same goods, after they had left the factory. And if the payment should be made by a third person who had purchased from the manufacturer it seems to us that if necessary he also might be taken to stand in the manufacturer's shoes, and still to make the payment on account of the stamps. Our opinion perhaps gets some confirmation from § 1310(c)

of the Act of 1919, but we rest it upon what we have said.

A protest was not necessary at the time of payment because, apart from other reasons, at that time the event creating the right to the drawback had not come to pass.

Judgment affirmed.

WELLS, ADMINISTRATRIX OF THE ESTATE OF CHARLES E. WELLS, DECEASED, *v.* BODKIN ET AL.

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

No. 144. Argued March 6, 1925.—Decided April 13, 1925.

The Act of May 14, 1880, confers a preference right of entry upon the successful contestant of a homestead claim and provides that, should the person who initiated a contest die "before the final termination of the same", the contest shall not abate, but that his heirs, who are citizens of the United States, may continue the prosecution and shall be entitled to the same rights under the act that the contestant would have if his death had not occurred. *Held:*

1. That, where the contestee relinquished and the contestant made her homestead application within the time allowed and later died, her heirs were entitled, in prosecuting the application, to preference over a stranger to the contest whose homestead application was made on the same day as the decedent's. P. 476.
2. The fact that an heir applying had himself made a homestead entry in his own right was no obstacle, when he relinquished it under permission of the Secretary of the Interior for the purpose of availing himself of the inherited right of entry. P. 478.

289 Fed. 245 affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing a bill whereby the appellant's decedent sought to have

the appellees declared trustees for himself of a tract of land patented to them under the public land laws.[1]

Mrs. Susie Wells, pro se, submitted.

Mr. Patrick H. Loughran, for appellees.

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

This is an appeal from the United States Circuit Court of Appeals for the Ninth Circuit under § 241. It was a bill in equity to have Patrick H. Bodkin and Arabella Bodkin, patentees of a quarter section of public land in the county of Riverside, California, declared trustees for the complainant Charles E. Wells. In May, 1903, one Geiger made a homestead entry of the land in dispute. In September of that year the land was withdrawn from public entry by the Secretary of the Interior under the Reclamation Act. 32 Stat. 388. Florence V. Bodkin filed a contest against the entry of Geiger on the 30th of January, 1908, pending this withdrawal. In March, 1908, Geiger filed a relinquishment of his entry, and in July, 1908, the contestant was notified by the local land office that she had a preference right of entry for a period of thirty days after the land should be restored to entry. On April 18, 1910, the land was restored to settlement, and to public entry on May 18, 1910. On the latter date Charles E. Wells, after having made a settlement, and Florence V. Bodkin, the contestant, each made a homestead application for the land. The applications on the same day were suspended for investigation as to the character of the land by the Surveyor General. On May 22, 1912, the suspension was removed and the land again restored to public entry. On June 3, 1912, the local land office rejected the homestead application of Wells and

[1] Charles E. Wells, appellant, died while this appeal was pending in this Court, and his administratrix was substituted as appellant.

allowed the application of Florence Bodkin; and this decision was affirmed by the Commissioner of the General Land Office on November 13, 1912. On May 27, 1913, the Secretary of the Interior reversed the decision of the Commissioner, because it appeared that on the 25th of March, 1912, before the suspension for investigation was removed, Florence Bodkin had died; and held that she had acquired no rights by her application to enter that would descend to her heirs. On August 29, 1913, the Secretary on rehearing overruled this decision and held that the contestant might have acquired rights by her application to enter that would have descended to her heirs, but denied a rehearing to her heirs, who were her father and mother, Patrick H. Bodkin and Arabella Bodkin, on the ground that Patrick H. Bodkin had made a homestead entry in his own right on other lands, and this precluded him and his wife from perfecting the application for a homestead as heirs of the contestant. Accordingly, the entry of Florence V. Bodkin was canceled and the application of Wells was allowed. But this was changed on January 3, 1914, when the Secretary of the Interior, in the exercise of his supervisory authority, decided that Patrick H. Bodkin, the father of the deceased contestant, might elect within thirty days to relinquish his own homestead entry on other lands and make a new entry based on the application of the deceased contestant, his daughter, with his wife as co-heir. The father thereupon relinquished his own homestead entry and, upon the entry of himself and his wife of the quarter section here in controversy, the patent issued to him. The District Court dismissed the bill, and this ruling was affirmed by the Circuit Court of Appeals.

Under the decision by this Court in the case of *McLaren* v. *Fleischer,* 256 U. S. 477, Florence V. Bodkin, as the successful contestant of the homestead entry of Geiger pending the withdrawal of the land from public entry

under the Reclamation Act, had thirty days after the land was restored to public entry within which to exercise her preference right of entry as a homesteader of the land. Had she lived, therefore, no question would have arisen here. The controversy arises on the effect of the proviso of § 2 of the Act of May 14, 1880, 21 Stat. 141, entitled "An Act for the Relief of Settlers on Public Lands," as amended by the Act of July 26, 1892, c. 251, 27 Stat. 270. The second section as amended reads as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: Provided, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported: Provided further, That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred."

The contention on behalf of the appellant is, that the relinquishment of the Geiger entry, upon which the contestant won the contest, was the final termination of it and that, thereafter, the contestant had only a mere right to make an application to enter, and that the statute had made no provision for succession or descent with reference to that, because the contest here is not with Geiger but is with Wells, who, having made a settlement of the land, filed his application on the same day that the contestant did. We think this a very narrow and

unwarranted construction of the meaning of the section. We concur in the opinion of the Secretary of the Interior when, in discussing this question, he said, 42 L. D. 340, 342:

"To restrict the term used, 'the final termination of the' contest, to the termination thereof as regards the contestee, only, would be contrary to the reason and purpose of the act. No interest of the contestee called for the enactment of such a law. The interest of the contestant, however, based upon a consideration, the payment of the costs of contest on the promise of a prospective right of entry, called for just such an enactment which should secure to such contestant and to his heirs that for which such consideration had been given by him, in part if not wholly, as in the present case; and good faith on the part of the United States with such contestant required such an enactment to apply to all cases where the contestant's death intervenes before the right of entry given him inchoately with his privilege of contest is merged into actual entry or otherwise extinguished in some of the ways indicated."

Further objection is made that the circumstance that Patrick H. Bodkin had himself made a homestead entry in his own right deprived him and his wife, co-heirs of the contestant, their daughter, of the capacity to inherit. The only objection to the inheritance was that under the homestead laws an entryman can not perfect title to two homesteads. If he chooses to relinquish one, it removes objection to his perfecting the other, certainly when he does this under the permission granted him by the Secretary of the Interior. As the Circuit Court of Appeals said in this case, the question whether the heir should be required or permitted to relinquish a homestead entry in his own right was one between him and the United States, with which the appellant had no concern.

The decree is affirmed.

BOHLER, TAX COLLECTOR OF RICHMOND COUNTY, GEORGIA, ET AL. *v.* CALLAWAY, EXECUTOR OF THE ESTATE OF J. B. WHITE, DECEASED.

CALLAWAY, EXECUTOR OF THE ESTATE OF J. B. WHITE, DECEASED, *v.* BOHLER, TAX COLLECTOR OF RICHMOND COUNTY, GEORGIA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Nos. 170, 171. Argued January 14, 1925.—Decided April 13, 1925.

1. Refusals to grant interlocutory injunctions to stay proceedings before a board of arbitration, *held* not *res judicata* in favor of the validity of those proceedings. P. 485.
2. The provision in Georgia for reviewing tax assessments by arbitration; Code 1910, § 1059; Acts 1910, pp. 22, 24, Parks Ann. Code, 1914, § 1116 (d); was superseded by Acts of 1918, No. 270, p. 232, which substitutes a petition in equity to enjoin excessive assessments. P. 485.
3. Where the only remedy afforded by the state law to a tax payer against an invalid tax is by a proceeding in equity in the state court, purely judicial in character, to enjoin excessive assessment, the federal court has jurisdiction of a bill to enjoin collection in which it is set up that the tax violates the federal Constitution. P. 486.
4. If the administration of the tax laws of a State is shown to result in a systematic and intentional discrimination against the plaintiff, the federal court may grant injunctive relief allowed by the state law without deciding the federal constitutional question upon which jurisdiction of the bill is based. P. 489.
5. Evidence *held* sufficient to show such systematic underassessment of property in Georgia, particularly of stocks and bonds, as justified a decree holding invalid an assessment of plaintiff's securities at full market value, and reducing it to 25%. P. 489.

6. In cases of this kind it is proper to call as witnesses tax officials of the State and county, because of their experience in assessing property, to testify to the existence of systematic and intentional undervaluation. *C. B. & Q. Ry.* v. *Babcock*, 204 U. S. 585, distinguished. P. 491.
7. To avoid addition of interest, a tender of money in discharge of a disputed tax should not be tied to the condition that it be received in full payment. P. 492.

291 Fed. 243 affirmed.

These are an appeal and a cross appeal direct from the District Court for the Southern District of Georgia, under § 238 of the Judicial Code, because involving the application of the Federal Constitution.

The bill sought to enjoin the levy of executions on delinquent tax assessments of the tax receiver of Richmond County, Georgia, against the estate of J. B. White, for the seven years, from 1911 to 1917. The assessments were as follows:

			Tax
Assessment,	1911	$1,000,866.87	$13,552.20
"	1912	1,399,161.67	18,888.68
"	1913	1,558,300.83	22,751.19
"	1914	1,548,735.38	21,527.42
"	1915	1,439,160.83	21,011.75
"	1916	1,509,936.00	22,347.05
"	1917	1,623,567.52	25,490.01

The aggregate amount of the executions was $145,568.30, with interest thereon to the date when issued, July 28, 1918, of $70,764.01, or a total of principal and interest of $216,332.01.

The bill of the complainant, who was White's executor, asked an injunction on two grounds. One was that in the sum assessed were national bank stocks, which under § 5219 R. S. should have been assessed for taxation in New York City where the banks were and not in Georgia,

and also stock in a Georgia railway exempt from taxation by the state law.

The second ground was that the assessment of the stocks and other securities was at their full market value, whereas in Georgia and in Richmond County property of this class in the hands of others was generally and intentionally assessed by the taxing officers at less than 25 per cent. of such value, and that such discrimination was unlawful under the statutes and constitution of Georgia and would work a denial of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

J. B. White, a native of Ireland, came to Georgia in 1866, and resided there continuously until 1909. He never was naturalized. In 1909 he went abroad and died at Genoa, Italy, in March, 1917, leaving a will, in which he described himself as of Richmond County in that State, and named the complainant, E. H. Callaway, as his executor. The executor probated the will and filed an inventory of the estate in the Court of the Ordinary. During the seven years—1911 to 1917—White had returned for taxation his real estate in Richmond County, amounting to $600,000, and $300 of household and kitchen furniture, but no other personal property. After the probate of the will, the tax receiver of the county demanded of the executor returns for taxation for seven years on the securities shown in the inventory. The certificates of stock and the bonds were physically in possession of Henry Clews & Company in New York. The executor insisted (though he subsequently abandoned the claim) that they were not subject to taxation in Georgia, for the reason that White was a nonresident. The tax receiver withdrew his demand. Thereafter, the Board of County Commissioners directed institution of proceedings in mandamus to compel the tax receiver to assess this property as delinquent. The suit for mandamus,

though it did not go to a rule absolute, brought out from a member of the firm of Clews & Company evidence of the exact amount and value of the property which White had left with them. The tax receiver then made the assessments at full market value. The executor demanded arbitration as provided by § 1059 of the Georgia Code of 1910 and the General Arbitration Act—Acts of Georgia of 1910, pp. 22, 24, as codified in Park's Annotated Code, (1914), § 1116 (d). The latter section directed the County Tax Receiver to assess property at the valuation fixed by the taxpayer in the return, if satisfactory, and if not, within thirty days to make an assessment on the best information he could procure, and notify the taxpayer. The latter might by a demand within twenty days have the question of true value referred to arbitrators, one selected by him, one by the tax receiver, and a third by the other two and, in default of their agreement, by the Board of County Commissioners. In this case the executor selected his arbitrator, the tax receiver his, and the county commissioners selected the third. On the day of the meeting of the arbitrators, the State applied to the Superior Court of the County for an injunction to prevent their further proceeding; but the application was denied. The issue was then heard by the arbitrators, the State and county appearing and taking part therein by counsel. The arbitrators made an award fixing the valuation at 25 per cent. of the market value of the securities, and the same was "fastened in tax digest of the County for the year 1917." The tax collector calculated the taxes due and submitted the amount to the executor as $27,980.88. This sum the executor tendered as full payment of the taxes due. On advice of counsel representing the State, the collector declined it. The State and county then filed a second petition in the Superior Court to enjoin the tax receiver and the tax collector from making the assessments and collections according to the arbitra-

tion. The Superior Court held the petition insufficient on demurrer and dismissed the application. Meantime the first application to enjoin the proceedings in arbitration reached the Supreme Court, and the Superior Court was sustained in refusing the injunction. *Georgia* v. *Callaway,* 150 Ga. 235. When the second application for injunction reached the Supreme Court, two of the judges out of six (only four being present) held that an Act of 1918 (Acts of Georgia of 1918, No. 270, p. 232) repealed the section of the Act of 1910 on which the arbitration had proceeded and rendered it void, and that therefore the original assessments made by the tax receiver were valid, the executions could issue and no injunction was necessary. Of the other two judges, one held that the Act of 1918 did not prevent the arbitration proceedings in which the State participated. The other held that the State had not put itself in a position to object to the assessment of the arbitrators, because its only complaint was that the award was fraudulent and it had not made out its case; and that the effect of the Act of 1918 it was not necessary for the court to decide. So an injunction was a second time refused. *Georgia* v. *Callaway,* 152 Ga. 871.

The second decision was made March 4, 1922. On March 9th following, tax executions on the assessments made by the tax receiver July 28, 1919, including those on the stock of the national banks of New York City, were issued. The executor thereupon again tendered payment of taxes and interest under the award of the arbitrators to the tax collector, which was again declined.

On March 22, 1922, the bill in the present case was filed, and after a hearing before three judges, a temporary injunction was issued by the District Court. The State and the county and the tax officials were made defendants, and filed answers. Among other objections by them to the equitable relief sought was that, though the

complainant in his bill admitted that there was due from him $27,980.88 to the tax receiver, it had not been paid, and the bill should be dismissed. Thereafter, on the 25th of September, 1922, the executor tendered the sum of $27,980.88, and it was accepted, without prejudice to the rights of any of the parties in the pending litigation. The executor then upon leave of court amended his bill and made the averment of the payment.

The District Court after a full hearing sustained its jurisdiction, held that the award of the arbitrators was invalid and that the State and county were not estopped by the state court orders to attack it, enjoined execution of the assessments on the national bank and Georgia railway stocks as non-taxable, found unlawful discrimination in the assessments on the other securities, enjoined collection thereof to the extent of 75 per cent., and decreed against the complainant interest on the 25 per cent. of the assessments already paid by him, from the date of his first tender until their actual payment. The cross appeal of the executor raised in his assignments of error the validity of the award of the arbitration and the question of interest.

Mr. E. H. Callaway, with whom *Mr. Wm. M. Howard* was on the brief, for appellant in No. 171, and for appellee in No. 170.

Mr. Benjamin E. Pierce, with whom *Mr. George M. Napier,* Attorney General of Georgia, *Mr. Wallace B. Pierce* and *Mr. Wm. K. Miller* were on the brief, for appellees in No. 171, and for appellants in No. 170.

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

First. A primary and preliminary question is that of the validity of the arbitration and award. The proceeding was initiated and award made under the Act of 1910,

but it was not begun until July 28, 1919, a year after the Act of 1918 claimed by appellants to have repealed the arbitration provision, was enacted.

The executor contends that the refusal of the state Supreme Court to enjoin the arbitration board from proceeding, was *res judicata* as to its validity. There were no defensive pleadings. It was a decision upon an interlocutory injunction and was presumably made in the exercise of judicial discretion upon a balance of convenience as to halting the proceeding of arbitration before its conclusion. *Chicago Great Western Ry.* v. *Kendall,* 266 U. S. 94, 100. The court pointed out that the ruling it affirmed was only a *pendente lite* injunction. 150 Ga. 235. Neither the court nor counsel referred to or considered the Act of 1918. Its effect upon the arbitration proceeding does not seem to have been called to the attention of either. To give finality to such a temporary ruling would be contrary to the principles governing estoppel by judgment. *Santowsky* v. *McKay,* 249 Fed. 51; *Knox* v. *Alwood,* 228 Fed. 753; *Webb* v. *Buckalew,* 82 N. Y. 555. When the case came again to the Supreme Court, on the second application for injunction by the tax authorities, it was dismissed for varying reasons of the four judges. Certainly, in view of the holding by two of them that the Act of 1918 repealed the provision for arbitration, it could not be said to be a judgment binding the parties to the validity of the award. We agree with the District Judge that no estoppel grew out of the injunction suits.

Second. Did the Act of 1918 render the award a nullity? Two of the state Supreme Court judges held that it did. Four federal judges have agreed with them. The sections of the act of 1918 here applicable were the first, third, fifth, seventh, and eighth. By the first section, when the owner of property had omitted to return the same for taxation at the time and for the

years the return should have been made, he, or, if he was dead, his personal representative, was required to return the property for taxation for each year it was delinquent. By the third section, when such property was of the class which should have been returned to the tax receiver of the county, the latter was to notify in writing the delinquent, or, if dead, his personal representative, requiring a return within twenty days. By the fifth section, if the delinquent or his personal representative refused to return the property after notice, the tax receiver was to assess the property from the best information he could obtain as to its value, for the years in default, and to notify such delinquent of the valuation, which should be final unless the person or persons so notified raised the question that it was excessive, in which event the further procedure should be by petition in equity in the Superior Court of the county where such property was assessed. By the seventh section, if the delinquent or his personal representative disputed the taxability of such property, he might also raise that question by petition in equity. By the eighth section, all laws and parts of laws in conflict with the act were repealed.

As already stated, by the laws in force before 1918, the remedy for the delinquent taxpayer was, in case of excessive assessment, to demand arbitration in 20 days. Obviously, the Act of 1918 gave to the taxpayer an opportunity to file a petition in equity to enjoin excessive assessment as a substitute for his previous remedy by arbitration. The repealing section, though not specific, was quite broad enough to end a resort to arbitration under the old law.

Third. Had the federal court jurisdiction to entertain the bill and enjoin the enforcement of the executions issued upon the assessments? Appellants cite *Keokuk & Hamilton Bridge Co.* v. *Salm,* 258 U. S. 122, as indi-

Section 4317 of the Civil Code of Georgia (1910) is as follows:

"Payments of taxes or other claims, made through ignorance of the law, or where the facts are all known, and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party, are deemed voluntary and can not be recovered back, unless made under an urgent and immediate necessity therefor, or to release person or property from detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule."

In Georgia the statutory methods for levy, assessment and collection of taxes are not merely cumulative—they are exhaustive. *Richmond County* v. *Steed,* 150 Ga. 229; *State* v. *Western & Atlantic R. R.,* 136 Ga. 619. It would seem to follow that the only remedy intended to be furnished in Georgia in such a case as this was by injunction in equity against excessive assessments. If the remedy by law is doubtful, equitable relief may be had. *Wilson* v. *Ill. So. Ry.,* 263 U. S. 574, 577; *Union Pacific R. R.* v. *Weld County,* 247 U. S. 282, 285, 286; *Davis* v. *Wakelee,* 156 U. S. 680, 688. The case seems to be quite like that of *Cummings* v. *National Bank,* 101 U. S. 153, in which, under a statute of Ohio authorizing a suit for injunction to prevent the collection of illegal taxes, it was held that a bill would lie in the federal court to enjoin the collection of a tax as illegal because it discriminated against the shares of a national bank.

Another objection to the bill is that the assessments made in July, 1919, have become final by the delay, because this bill was not filed until March 11, 1922. It is argued that, as the petition in equity takes the place of the arbitration proceeding and the arbitration proceeding had to be begun within twenty days after the notification to the taxpayer of the assessment, in some way or other the 20-day limitation is projected into the new act.

No statutory time limitation which would bar the resort to a petition or a bill in equity as filed in this case has been pointed out to us by counsel, and we can not infer one.

We come now to the issue of discrimination. By the constitution of Georgia, Article 7, § 2, it is provided that "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." By the laws of Georgia all real and personal property, including stocks and securities in corporations in other States owned by citizens of Georgia, is to be returned and taxed at its fair market value, i. e., what it would bring at cash sale when sold in such manner as it is usually sold. Park's Annotated Code of Georgia (1914), §§ 1002, 1002 a, 1003 and 1004.

It is well settled that if the administration of the tax laws of a State is shown to result in an intentional and systematic discrimination against a complainant by a bill in a federal court, the court may grant relief by injunction under the state law without deciding the federal constitutional question upon which jurisdiction of the bill is based. *Louis. & Nash. R. R.* v. *Greene,* 244 U. S. 522, 527; *Greene* v. *Louisville R. R.,* 244 U. S. 499, 508, 514–519; *Taylor* v. *L. & N. R. R.,* 88 Fed. 350; *Georgia Railroad* v. *Wright,* 125 Ga. 589, 602, 603.

Complainant's evidence to show that the valuation of real and personal property by the county officials was far below the market value in Richmond County and throughout the State of Georgia, is convincing. It consists of reports and admissions by the Comptroller General and the State Tax Commissioner, the chief taxing officers of the State, and of the testimony of past and present taxing officials of a great number of counties,

cating the contrary. That was a bill in equity by a bridge company to enjoin a tax assessment by county assessors on a railroad bridge, because of discrimination. The assessment made by the county assessors was subject to revision by a board of review, required to give a hearing and to correct the assessment as should appear just. The payment of taxes was not to be enforced by distraint or levy, but by legal proceedings in a civil suit for the collection of a debt in which the owner might appear and defend on any legal ground, including discrimination. The complainant there brought his bill without taking any of the steps offered by the statute as an administrative remedy, and ignored the defense he might make in the suit to collect the tax. The question here is different. The remedy to be taken by the taxpayer against excessive assessment is by petition in equity. That is a judicial proceeding. Such a proceeding is not administrative, as the appeal to the Supreme Court was in the case of *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210. Nothing in the Georgia decisions shows that the petition here provided was other than a regular application to a court of equity for relief by injunction. Nothing indicates that the court was to make administrative assessment. It was only to enjoin excessive assessment. No reason existed why a federal court sitting in the same jurisdiction might not grant equitable relief to the taxpayer against the executions on the assessments, provided there were stated in the bill ground for federal equity jurisdiction. This was a suit of a civil nature under § 247 of the Judicial Code, and arose under the Constitution of the United States. It was properly in equity because there was no adequate remedy at law, the assessments being final except as subject to equitable intervention. The Georgia law gives no right of action to recover taxes voluntarily paid, even under protest on the ground that they were illegally assessed and collected.

some having large cities, and others without such cities, in different parts of the State. In his report of 1920, the State Tax Commissioner said he thought it wise not to require more than 35 per cent. of the true value of real estate as a minimum basis for equalizing purposes, and he finally approved a comparative statement of counties showing the highest per cent. of true value of lands returned to be 60 and the lowest 25. The evidence further showed that the assessment of intangible personalty was at a much less percentage of true value than that of real estate. The fact seemed to be that stocks and bonds were not generally returned at all, and when they were returned they were assessed at a mere nominal figure. The condition in respect to the low valuations was attributed by several of the taxing officials, who were witnesses for the complainant, in part to the arbitration method. They said that if they attempted to impose anything like the real value, an arbitration was demanded, and the invariable result was a reduction of the assessment, so that there had come to be a generally understood acquiescence by county officials in low percentages. It was quite apparent that the undervaluation of both realty and personalty by county taxing officials in Richmond County and elsewhere in Georgia had become systematic and intentional. It would seem from the evidence and the reports that not more than 10 per cent. of stocks and bonds was taxed at all. The Comptroller General's report for 1912 said that the system of assessment of such property was but little better than voluntary contributions of taxpayers to State's revenue. The recognition of these conditions seems to have led equalizers and assessors in fairness to scale down the assessment of stocks and bonds when returned. Hence, we find that the Board of Tax Assessors of Richmond County, a body whose duty it was to receive the regular annual returns from the tax receiver and equalize them as between individuals, Park's

Annotated Code (1914) § 1116 (k), in determining the value of the White estate for taxing purposes for 1918—a current assessment the next year after those here in suit—fixed the value of the same stocks and bonds and intangibles at $250,000, or about 18 per cent. of their market value. Two of the assessors by affidavit testified from their experience that such percentage was at a higher rate than that at which such property when returned was usually assessed. The tax receiver who returned the property in this case at its full market value for the seven years, testified before the Board of Arbitration that neither he nor the Board of Appraisers had ever taxed real estate at more than two-thirds of its value, mortgages or stocks at more than 50 per cent., and county property at more than 33⅓ per cent.

Objection is made to the testimony of tax officials in this case, especially to that of the tax receiver who fixed the 100 per cent. assessment in the present case, and to that of the members of the Board of Tax Assessors and Equalizers who assessed the value of the White estate for the year 1918. It is based upon the language of this Court in *C. B. & Q. Ry.* v. *Babcock,* 204 U. S. 585, 593. We do not think that the citation has application here. That was a case where members of a state railway assessing board were called by the taxpayers and subjected to an elaborate cross-examination with reference to the operation of their minds in valuing and taxing the particular railroads whose assessment was there in question. It was held to be improper thus to impeach official awards. The witnesses in this case were not subjected to cross-examination as to the reasons for their official action in this case. They were called because they were men of long experience in assessing property in the county and State to testify to the existence of a systematic and intentional undervaluation of the property of others—of property generally.

The court, in reaching a conclusion as to the percentage to which the valuation here should be reduced in order fairly to avoid discrimination, fixed 25 per cent., the same as that in the award of the Board of Arbitration. It is insisted that the action of the board, because its power to make an award was abolished by the law of 1918, was not admissible evidence. It is quite true that the award might be of doubtful competency if offered as independent evidence, but the fact that the award was made an issue in the pleadings and evidence and was a part of the record, suggests a difference. But even if it ought not to have been considered, the other evidence sustaining the conclusion of the court was ample. The evidence which the defendants offered was of a stereotyped character from the state and county officials of many counties, in which it was said that they all struggled to obey the law; but nothing which was said by them was any real contradiction of the affidavits already referred to, or of the reports of the state officials already commented on.

There only remains to consider the question of interest made by the executor on his cross appeal. The District Court exacted interest on the amount found to be due and which the executor admitted to be due, from the time of the first tender by him at the time of the award of the arbitrators until the final tender some three years later when the amendment to the bill was filed. We think this was right. The tenders of the complainant were with a condition attached, namely that the money to be received was to be received in full payment of the claim. The complainant had no right to impose such limitation. If he owed the money, as he admitted he did, he should have paid it without restriction, and his withholding it for three years requires that he pay interest on it during the time of detention.

Decree affirmed.

Counsel for Parties.

WESTERN & ATLANTIC RAILROAD *v.* GEORGIA PUBLIC SERVICE COMMISSION ET AL.

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

No. 209. Argued January 20, 1925.—Decided April 13, 1925.

1. A rule of a state public service commission that railroad switching service to which shippers are entitled by law or by rule of the commission, whether or not granted voluntarily by the railroad, shall not be discontinued without the consent of the commission after notice and hearing, is reasonable and within the police power of the State. P. 496.
2. An order of a state commission requiring a railroad to continue to furnish switching service to a shipper on an established industrial siding does not deprive the railroad of property without due process, in violation of the Fourteenth Amendment, merely because the switching, separately considered, may not be profitable to the railroad, or may even involve a loss. P. 496.
3. Under § 402 of the Transportation Act, 1920, the power to order establishment or abandonment of such side tracks, though employed largely for interstate commerce, is not with the Interstate Commerce Commission but with the States. P. 497.
4. A bill to enjoin a state commission from enforcing an order requiring the plaintiff railroad to maintain service on an industrial switch track, will not lie upon the ground that the service creates undue discrimination between interstate shippers in cost of transportation, since this is a question which must be presented to the Interstate Commerce Commission. P. 497.

Affirmed.

APPEAL from a decree of the District Court refusing a temporary injunction in a suit to restrain the appellee commission from enforcing an order requiring the appellant railroad to maintain service on an industrial side track.

Mr. Fitzgerald Hall, with whom *Messrs. H. C. Peeples, Frank Slemons,* and *William Waller* were on the brief for the appellant.

Mr. W. E. Watkins, for appellees.

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

The Western & Atlantic Railroad Company, an interstate common carrier, filed this bill in the District Court of the United States for the Northern District of Georgia against the Georgia Public Service Commission and its members, to enjoin the enforcement of an order of the Commission requiring the railroad to furnish switching service on an industrial siding to the National Bonded Warehouse, Inc., of Atlanta, Georgia.

In accordance with the limitations of § 266 of the Judicial Code, an application was made for a temporary injunction to a court consisting of a Circuit and two District Judges. The application was denied and this appeal was taken.

The industrial siding in question diverges from the main line of the Railroad Company, and was built many years ago for the convenience of industries then located on it. At the present time J. K. Shippey and the National Bonded Warehouse are the only industries served by it. The siding is all upon the right of way of the Railroad Company.

On August 2, 1923, the Railroad Company notified the Warehouse Company, that unless it signed a standard form of contract in respect to the sidetrack, its use and maintenance, which had been submitted to it, the service would be discontinued after August 15th. The Warehouse Company made complaint to the Public Service Commission. The Commission advised the Railroad Company that no application from the Company had been made to the Commission for such authority, which, under its Rule 14, was necessary before the service could be discontinued. However, on August 28th a full hearing was held by the Commission with the parties present, and as a result of such hearing it was ordered that, effective

immediately on receipt of the order, the Railroad Company should restore the service. Thereupon this bill was filed.

The bill avers that the Warehouse Company's premises are two city blocks, or 1600 feet, from the Railroad's public team tracks, which are adequate in size and construction conveniently and properly to handle all the public business, including that of the Warehouse Company; and that since the discontinuance of switching service on August 15th, conformably to the notice given, the Railroad has been ready to serve that industry on public team tracks; and that industrial sidings like the one in question have been put in without any care to avoid undue discrimination between interstate shippers in cost of transportation. It says that of the business done over the side track 85 per cent. is interstate. The Railroad Company therefore avers that if it does not continue the service as required by the order, it will be subject to penalty under the Georgia state law, and that if it obeys the order it will be guilty of undue discrimination under the interstate commerce law, and so will be subject to a heavy penalty in the federal jurisdiction.

The bill further alleges that the side track is out of repair and that in order to put it in proper condition it will require an expenditure of $440, that the receipts from the switching are but a small part of the cost of it and that enforced compliance with the order will thus deprive the Company of its property without due process of law.

The order made by the Commission was based on its General Order 14, promulgated December 23, 1909, which provided that any and all facilities and privileges enjoyed by shippers to which they were entitled by law or any rule of the Commission, whether granted by voluntary action on behalf of the railroad companies or otherwise, should not be discontinued without the consent of the Railroad Commission.

The three-judge court refused the application, on the ground that Rule 14 had not been complied with. Rule 14 is a reasonable rule and the Commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the Commission and a showing made. The doubt which arises in our minds is whether the Public Service Commission, by its consent to a full hearing of the issue without a formal petition and an order based on the merits, did not waive the defect of a petition. The action of the Company in discontinuing the service without a petition was arbitrary and defiant, but the subsequent action of the Commission seems to have condoned the fault in such a way as to prevent our making it a reason for not looking farther into the issues now raised by the Company in its bill.

It is said that the requirement of the continuance of the service deprived the Company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the sidetrack was much greater in out-of-pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (§ 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Lime Co.* v. *C. & N. W. Ry. Co.,* 233 U. S. 211. The requirement that such a service should not be discontinued without notice and hearing was clearly within the police power of the State. *Chicago & Northwestern R. R. Co.* v. *Ochs,* 249 U. S. 416; *Lake Erie & Western R. R. Co.* v. *Cameron,* 249 U. S. 422; *Railroad Commission* v. *L. & N. R. R. Co.,* 148 Ga. 442. Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the Company that the switching does not work a benefit

in the increased business that the Company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be held to be a confiscation of property, even if it involves a loss. See *Fort Smith Light & Traction Company* v. *Bourland,* 267 U. S. 330.

It seems to be the contention of the Company that, since 85 per cent. of the business done on the side track is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission, and that the state commission is without authority in the premises. Such a claim is in the teeth of the Transportation Act of 1920, 41 Stat. 456, c. 91, § 402, par. 22, which provides that the authority of the commission conferred by § 402 over the extension or abandonment of interstate railway lines shall not extend to the construction of spur industrial or side tracks. See *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331, 345.

The question whether the continuance of the service on this industrial track violates the Interstate Commerce Act as unduly discriminatory, is one that involves issues not primarily for the courts, but is for the Interstate Commerce Commission. It requires a consideration by experts of the benefit of the use of such a siding as compared with that of other sidings, in connection with the rates in interstate commerce, to determine whether there is undue discrimination between shippers. The Railroad Company is therefore in no position to appeal to the courts on this ground until it has invoked the investigation and decision of the Interstate Commerce Commission upon the concrete facts in a proper manner. See *Great Northern Railway* v. *Merchants Elevator Co.,* 259 U. S. 285, 291, and the cases cited on page 295. If

and when the Commission shall have made such an investigation and have found the existence of undue discrimination, its order may well not be a specific direction against a continuance of service on a particular siding, but an order upon the Company to remove the undue discrimination between interstate shippers, giving discretion to the Company to adopt a satisfactory method of meeting the requirement. Compare *Houston & Texas Railway* v. *United States,* 234 U. S. 342, 360; *American Ry. Express* v. *Caldwell,* 244 U. S. 617, 624. In any event, relief can not be had by this bill, on the ground of undue discrimination, at the present stage of the controversy.

Affirmed.

STEELE *v.* UNITED STATES No. 1.

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

No. 235. Argued March 11, 1925.—Decided April 13, 1925.

1. Description, in a search warrant, of a building as a garage used for business purposes, giving its street and one of its two house numbers, *held* sufficiently definite, under the circumstances, for search of the whole building, which had three street entrances, and means of access between its parts on the ground and upper floors, and was used in conducting an automobile garage and storage business. P. 502.
2. A search warrant sufficiently describes the place to be searched if it enables the officer, with reasonable effort, to identify it. P. 503.
3. A warrant authorizing search of a building used as a garage, and any building or rooms connected or used in connection with the garage, *held* to justify search of the upper rooms connected with the garage by elevator. P. 503.
4. Search of rooms in a building used by a business *held* not unlawful under Prohibition Act § 25, because one of the rooms, not searched and in which no liquor was found, was slept and cooked in by an employee of the business. P. 503.

5. Description of articles to be searched for as "cases of whiskey" *held* sufficient. P. 504.
6. Where an experienced prohibition agent saw cases labeled "whiskey", which looked to him like whiskey cases, being unloaded at a building which, as he ascertained, had no permit to store whiskey, there was probable cause for warrant and seizure. P. 504.

Affirmed.

APPEAL from a judgment of the District Court refusing to vacate a search warrant, under which the appellant's premises were searched and quantities of whiskey, gin and alcohol were found and seized. See also the next case, *post*, p. 505.

Mr. Meyer Kraushaar, for appellant.

Solicitor General Beck, Assistant Attorney General Willebrandt, and *Mr. Mahlon D. Kiefer*, Special Assistant to the Attorney General, were on the brief for the United States.

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

This is an appeal, under § 238 of the Judicial Code, direct from the District Court, being a case involving the application of the Federal Constitution. The judgment complained of denied a petition of Steele for an order vacating a search warrant, by authority of which Steele's premises were searched and a large amount of whiskey and other intoxicating liquor was found and seized. He contends that the search warrant violated the Fourth Amendment, because not issued upon probable cause, and not particularly describing the place to be searched or the property to be seized; and because the search conducted under the warrant was unreasonable. The affidavit for search warrant was as follows:

"Southern District of New York, ss:

"Isidor Einstein, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in

the State of New York. On December 6, 1922, at about 10 o'clock A. M., accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey. A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

"The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

"This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

"Isidor Einstein.

"Sworn to before me this 6th day of December, 1922. Saml. M. Hitchcock, U. S. Commissioner, Southern District of New York."

The search warrant issued by the Commissioner followed the affidavit in the description of the place and property to be searched and seized and was directed to Einstein as General Prohibition Agent.

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, provides for the issue of a search

warrant to seize liquor and its containers intended for use in violating the Act, and provides that the search warrant shall be issued as provided in Title XI of the Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 228.

Under that Title, in conformity with the Fourth Amendment, the warrant can be issued only upon probable cause, supported by affidavit, particularly describing the property and place to be searched. The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. If the judge or commissioner is satisfied of the existence of the grounds for the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner. If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause the property to be restored to the person from whom it was taken; but if it appears that the

property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing, or to be otherwise disposed of according to law.

The facts developed before the Commissioner on hearing this petition for return of the seized goods were these: Einstein and Moe Smith were prohibition agents. They saw a truck depositing cases in a garage on the opposite side of 46th Street from where they were. Einstein crossed the street and saw they were cases stenciled as whiskey. Einstein left his companion to remain in the neighborhood until he could get the warrant, and in somewhat more than an hour returned with it and made the seizure. The building searched was a four-story building in New York City on the south side of West 46th Street, with a sign on it: "Indian Head Auto Truck Service—Indian Head Storage Warehouse, No. 609 and 611." It was all under lease to Steele. It was entered by three entrances from the street, one on the 609 side, which is used, and which leads to a staircase running up to the four floors. On the 611 side there is another staircase of a similar character, which is closed, and in the middle of the building is an automobile entrance from the street into a garage, and opposite to the entrance on the south side is an elevator reaching to the four stories, of sufficient size to take up a Ford machine. There is no partition between 611 and 609 on the ground or garage floor, and there were only partial partitions above, and none which prevented access to the elevator on any floor from either the 609 or 611 side. The evidence left no doubt that, though the building had two numbers, the garage business covering the whole first floor and the storage business above were of such a character and so related to the elevator that there was no real

division in fact or in use of the building into separate halves. The places searched and in which the liquor was found were all rooms connected with the garage by the elevator. One of them was a room on the second floor with a door open toward the elevator, in which, when Einstein made his search, three men were bottling and corking whiskey. There was a room on one of the floors, flimsily boarded off, in which an employee had a cot and a cook stove. The prohibition agents seized 150 cases of whiskey, 92 bags of whiskey, and one 5-gallon can of alcohol, on the third floor on the 609 side. On the second floor, 33 cases of gin were seized on the 609 side and six 5-gallon jugs of whiskey, 33 cases of gin, 102 quarts of whiskey, and two 50-gallon barrels of whiskey, and a corking machine, were taken on the 611 side of the building.

The description of the building as a garage and for business purposes at 611 W. 46th Street clearly indicated the whole building as the place intended to be searched. It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended. *Rothlisberger* v. *United States,* 289 Fed. 72; *United States* v. *Borkowski,* 268 Fed. 408, 411; *Commonwealth* v. *Dana,* 2 Metc. 329, 336; *Metcalf* v. *Weed,* 66 N. H. 176; *Rose* v. *State,* 171 Ind. 662; *McSherry* v. *Heimer,* 132 Minn. 260.

Nor did the search go too far. A warrant was applied for to search any building or rooms connected or used in connection with the garage, or the basement or sub-cellar beneath the same. It is quite evident that the elevator of the garage connected it with every floor and room in the building and was intended to be used with it.

The attempt to give the building the character of a dwelling house by reason of the fact that an employee slept and cooked in a room on one of the floors was of

course futile. Section 25 of the Prohibition Act forbids the search of any private dwelling unless it is used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house. It provides that "private dwelling" is to be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house. Certainly the room occupied in this case was not a private dwelling within these descriptions, but more than this, it was not searched and no liquor was found in it. *Forni* v. *United States,* 3 Fed. (2d) 354.

The search warrant properly described the building searched as a garage and one for business purposes.

Then it is said that the property seized was not sufficiently identified in the warrant. It was described as "cases of whiskey," and while there is no evidence specifically identifying the particular cases which were seized as those which Einstein saw, the description as "cases of whiskey" is quite specific enough. *Elrod* v. *Moss,* (C. C. A. 4th) 278 Fed. 123, 129; *Sutton* v. *United States,* 289 Fed. 488 (C. C. A. 5th); *Tynan* v. *United States,* 297 Fed. 177 (C. C. A. 9th); *Forni* v. *United States,* 3 Fed. (2d) 354 (C. C. A. 9th).

Finally it is said there was no probable cause for the warrant and the seizure. Einstein, a man of experience in such prosecutions and in such seizures, saw the name "whiskey" stenciled on cases and said they looked like whiskey cases. He ascertained by his own investigation of the official records that there was no permit for the legal storage of whiskey on these premises. In a recent case we have had occasion to lay down what is probable cause for a search. *Carroll* v. *United States,* 267 U. S. 132. "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in

believing that the offense has been committed, it is sufficient." What Einstein saw and ascertained was quite sufficient to warrant a man of prudence and caution and his experience in believing that the offense had been committed of possessing illegally whiskey and intoxicating liquor, and that it was in the building he described.

The search warrant fully complied with the statutory and constitutional requirements as set forth above, the liquor was lawfully seized and the District Court rightly held that it should not be returned.

The decree is affirmed.

Affirmed.

STEELE *v.* UNITED STATES No. 2.

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

No. 636. Argued March 11, 1925.—Decided April 13, 1925.

1. A judgment upholding a search warrant on a petition to vacate it is *res judicata* as to the competency of the person to whom the warrant was directed and as to probable cause for its issuance; so that the petitioner cannot subsequently raise the question in a criminal proceeding against him by objecting to evidence of seizure under the warrant. P. 507.
2. Section 6 of Title XI of the Espionage Act, adopted in the Prohibition Act (Title II, § 25), authorizes a search warrant to be issued "to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof"—*Held*, that this is not meant to be confined to officers of the United States in the limited Constitutional sense, but includes a general prohibition agent appointed by the Commissioner of Internal Revenue. P. 507.
3. In a prosecution for illegal possession of intoxicating liquor, in which the results of a seizure under a search warrant are offered against the defendant, the court, in deciding upon the competency of the evidence, determines whether under the facts and law there was probable cause for the warrant, and this question is not for the jury. P. 510.

Affirmed.

ERROR to a sentence under the National Prohibition Act. See also the case preceding, *ante*, p. 498.

Mr. Meyer Kraushaar, for plaintiff in error.

Solicitor General Beck, Assistant Attorney General Willebrandt, and *Mr. Mahlon D. Kiefer*, Special Assistant to the Attorney General, were on the brief for the United States.

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

This is a direct writ of error under § 238 of the Judicial Code to a conviction in the District Court of John F. Steele on an information in the District Court, for unlawfully, willfully and knowingly possessing a quantity of intoxicating liquor in violation of the National Prohibition Act. The prosecution grew out of the seizure of whiskey and gin upon a search warrant, at 611 West 46th Street, New York City, the validity of which we have had occasion to examine in the case just preceding. The question here is as to the competency of the evidence of seizure under the search warrant which we there found sufficient. In addition to the grounds urged in the last case, the validity of seizure is attacked because the search warrant was issued to a general prohibition agent, when under § 6 of Title XI of the Espionage Act of June 15, 1917, (c. 30, 40 Stat. 217, 228), such a warrant must be issued "to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof."

The argument is that the prohibition agent is appointed by the Commissioner of Internal Revenue, and therefore is only an employee and not a civil officer of the government in the constitutional sense, because such an officer under Article 2, Section 2 of the Constitution

can only be appointed either by the President and the Senate, the President alone, the courts of law or the heads of departments.

It should first be said that Steele is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so, and did not assign error on account of it in his appeal to this Court. The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore *res judicata* as against him.

But even if this were not so, we do not think the objection well taken. We think that the expression "civil officer of the United States duly authorized to enforce, or assist in enforcing, any law thereof," as used in the Espionage Act, does not mean an officer in the constitutional sense; that Congress in incorporating the provision in § 25, Title II, of the National Prohibition Act, did not so construe it and had no intention thus to limit persons authorized to receive and serve search warrants. It is quite true that the words "officer of the United States," when employed in the statutes of the United States, is to be taken usually to have the limited constitutional meaning. *Burnap* v. *United States,* 252 U. S. 512; *United States* v. *Mouat,* 124 U. S. 303; *United States* v. *Smith,* 124 U. S. 525. But we find that this Court in consideration of the context has sometimes given it an enlarged meaning and has found it to include others than those appointed by the President, heads of departments, and courts. *United States* v. *Hendee,* 124 U. S. 309. The emphasis of the words of description in the Espionage Act is really on the limitations that the person designated shall be a civil and not a military agent of the government and shall be one "duly authorized to enforce or assist in enforcing any law of the United States." It is not to be supposed that Congress wished to exclude from those empowered to receive and execute

search warrants persons usually called officers who are in their duties most widely employed to enforce or assist in enforcing laws. Thus deputy marshals of the United States are appointed by the United States marshal under whom they serve (§ 780, Revised Statutes), and he and his deputies have in each State the same power in executing the laws of the United States as the sheriffs and their deputies in such State in executing the laws thereof. The deputy marshal is not in the constitutional sense an officer of the United States, and yet marshals and deputy marshals are the persons chiefly charged with the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law. *In re Neagle,* 135 U. S. 1, 68, 69. A deputy marshal is engaged in serving all sorts of writs and is called upon to exercise great responsibility and discretion in the service of some of them in dealing with the persons and property of individuals and in the preservation of their constitutional rights. The same thing may be said of deputy collectors of customs. Under § 2630, a collector of customs, with the approval of the Secretary of the Treasury, may employ within his district such number of proper persons as deputy collectors of customs as he shall deem necessary, and such deputies are declared to be officers of the customs, and the collector may exercise his powers and perform his duties by deputy. And one of the chief functions of the collectors of customs and of the deputy collector is the seizure of goods which have not paid a tax, as seen by Chapter 10 of Title 34 of the Revised Statutes. Deputy collectors of internal revenue are to be appointed by the Collector of Internal Revenue; § 3148 R. S. He may appoint as many as he thinks proper. Each deputy is to have the like authority which by law is vested in the collector himself, and distraint and seizure in the assessment and collection of taxes are authorized by Ch. 2, Title 35:

The National Prohibition Act in Title I, § 5, reads:

" The Commissioner of Internal Revenue, his assistants, agents, and inspectors, and *all other officers of the United States* whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States."

Title II, § 28, is:

" The Commissioner, his assistants, agents, and inspectors *and all other officers of the United States* whose duty it is to enforce criminal laws shall have all the power in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States."

Section 3462 of the Revised Statutes is one of the laws thus referred to in the foregoing sections, and provides:

" That the several judges of the circuit and district courts of the United States and commissioners of the circuit courts, may, within their respective jurisdictions, issue a search-warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises."

Again, Title II, § 1, of the Prohibition Act, reads:

"Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose."

Again, Title II, § 26, reads:

" When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting, in violation of the law, intoxicating liq-

uors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

The foregoing would seem to indicate that lawful seizures were not to be confined to constitutional officers.

Again, in § 6 of the Act Supplemental to the National Prohibition Act, 42 Stat. 222, it is provided that any officer, agent or employee of the United States engaged in the enforcement of this Act or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, without a warrant directing such search, shall be guilty of a misdemeanor.

This justifies an inference that Congress expected searches to be made with search warrants by officers, agents or employees.

The question whether a prohibition agent has the power and right to serve a search warrant as provided in the Espionage Act, and § 25 of Title II of the National Prohibition Act, has led to some difference of opinion among the judges of the Circuit Courts of Appeals and also of the District Courts, but the weight of authority as indicated by the decisions is strongly in favor of the broader construction which vests the power and duty to receive and serve a search warrant in prohibition agents appointed by the Commissioner of Internal Revenue. *Raine* v. *United States,* 299 Fed. 407 (C. C. A. 9th); *Keehn* v. *United States,* 300 Fed. 493 (C. C. A. 1st); *United States* v. *American Brewing Co.,* 296 Fed. 772; *United States* v. *O'Connor,* 294 Fed. 584; *United States* v. *Syrek,* 290 Fed. 820; *United States* v. *Keller,* 288 Fed. 204.

The second question which is raised here by proper exception and assignment is whether the defendant had the right to have submitted to the jury the issue of fact

whether there was probable cause to issue the warrant, with direction that if the jury found that there was not probable cause, it should ignore the evidence resulting from the seizure and acquit the defendant. There are two answers to this assignment of error. One has already been referred to, that the fact of the existence of probable cause in the issue of the search warrant was *res judicata,* made so by the judgment of the court in the case preceding that the property could not be returned to Steele. The second answer is that the question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the court and not for the jury. *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 103; *Bartlett* v. *Smith,* 11 M. & W. 483; *Doe dem. Jenkins* v. *Davies,* 10 Ad. & El. N. S. 314; 5 Wigmore, Evidence (2d Ed.) § 2550.

The judgment of the District Court is affirmed.

Affirmed.

SANTA FE PACIFIC RAILROAD COMPANY *v.* WORK, SECRETARY OF THE INTERIOR.

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

No. 302. Argued March 18, 19, 1925.—Decided April 13, 1925.

1. The construction of a law of the United States was "drawn in question by the defendant" within the meaning of § 250, par. 6 of the Judicial Code permitting appeals to this Court from the Court of Appeals of the District of Columbia, where the Secretary of the Interior, as defendant, secured the dismissal of plaintiff's bill upon the ground that the lieu land selection in controversy was not permitted by an Act of Congress. P. 515.
2. Under the Act of June 22, 1874, providing that railroads may relinquish lands appertaining to their land grants which are found in possession of actual settlers, etc., and select an equal quantity of other lands in lieu thereof from any of the public lands "not mineral" within the limits of the grant, not otherwise appropriated

at the date of selection, "to which they shall receive title the same as though originally granted," a railroad company is not entitled to lieu-select coal land, even though coal and iron lands are not excluded from its land grant but are declared therein not to fall within the term "mineral." P. 516.

54 App. D. C. 161; 295 Fed. 982, affirmed.

APPEAL from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District, dismissing a bill to restrain the Secretary of the Interior from canceling a railroad lieu selection.

Mr. F. W. Clements, with whom *Mr. Alexander Britton* was on the brief, for appellant.

In determining what is meant by "public lands not mineral," as used in the act of June 22, 1874, that act must be construed as *in pari materia* with the granting act; and when so construed, the lands are considered as non-mineral notwithstanding the presence of valuable deposits of coal. There is nothing in the act of 1874 limiting the selection of lands in lieu of those relinquished to other "lands equal in quantity *and value,*" as said by the court below. Congress undoubtedly had a defined policy in permitting the large transcontinental railroads to take under their grants lands containing iron or coal products. These railroads were great undertakings opening up country practically unexplored, and coal and iron were necessary products, not only in construction, but in later maintenance of the proposed railways. Nothing had occurred to change this policy, and the construction of the act of '74 should be in line with the constructive policy so clearly defined in the original granting acts; and surely the generosity of the companies in relinquishing that which belonged to them, in order to protect unfortunates misled, furnishes no reason for changing this policy or penalizing the companies.

The act of 1874 provided that the grantee company should receive title to the lieu selection as though originally granted. In other words, the lieu lands were to be taken in place of those surrendered, as the surrendered lands might have been taken under original grant. This left both the companies and the individual as though the provision protecting those coming after definite location had been incorporated in the original grant. Nothing could be fairer, and if this were the purpose of Congress it could not have been more clearly expressed.

The granting act of 1866 permits selection within the enlarged or indemnity belt of lands containing valuable deposits of coal where taken in lieu of agricultural lands lost within the primary or place limits of the grants. The Secretary's action in refusing to approve the Company's selection is arbitrary, in that he exceeded his power and authority in taking into consideration in determining its validity the facts with respect to the possible coal contents and the valuation of the lands in that regard.

Mr. Harry L. Underwood, Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney General Wells* were on the brief, for the appellee.

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

The bill in this case was filed by the Santa Fe Pacific Railroad Company, incorporated under an Act of Congress, against the Secretary of the Interior to enjoin him from canceling a certain selection of lieu lands, and to command him to recall the order for such cancellation and to refrain from any further action except to issue a patent therefor in accordance with the rights of the plaintiff.

By Act of Congress, July 27, 1866, 14 Stat. 292, Congress made a grant of lands in New Mexico and Arizona to the Atlantic & Pacific Railroad Company in aid of the construction of a railroad of that name. The company defaulted on its bonds, the mortgage was foreclosed, and a sale effected to the Santa Fe Pacific Railroad Company, the complainant, which became possessed of all the rights granted by the Act of July 27, 1866, to the mortgagor company. The grant of 1866 covered every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the railroad line, not reserved, sold, granted or otherwise appropriated, at the time that the line of the road was designated by the filing of a plat in the General Land Office. The granting act provided further that the word "mineral" when it occurred in the Act should not be held to include iron or coal.

The Act of June 22, 1874, c. 400, 18 Stat. 194, provided:

"That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so

construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes."

Pursuant to this legislation, the Railroad Company, on December 1, 1921, filed in the proper local land office an application to select the subject of the controversy here, being a forty-acre tract, the quarter of a quarter section within the primary or place limits of the grant in Arizona, in lieu of a tract of the same area in the same limits which it had relinquished because of a homestead claim coming within the terms of the Act of 1874. The filing was accepted by the local land office, but was rejected by the Secretary of the Interior because the land applied for was embraced in a coal withdrawal. The view of the Secretary was that the Act of June 22, 1874, did not authorize the selection of coal land in lieu of the land relinquished. The argument of the Railroad Company is that as the granting Act of 1866 declared that "mineral" in that act should not include coal or iron, the same construction should be given to the same word in the Act of June 22, 1874, in so far as selections made by the appellant are concerned.

The Supreme Court of the District sustained a motion to dismiss the bill for want of equity, and this action was affirmed by the Court of Appeals.

The question whether this Court has jurisdiction of the appeal is raised on behalf of the Secretary of the Interior. We think it has under the 6th paragraph of § 250 of the Judicial Code, which permits an appeal from the Court of Appeals of the District in cases "in which the construction of any law of the United States is drawn in question by the defendant." Certainly the Secretary of the Interior, as the defendant herein, by his contention that the Act of 1874 does not permit the Railroad Company to select lieu lands which are coal lands, draws in question the construction of a law of the United States.

The Act of 1874 was passed to help homestead and other settlers who were in hard case because they had established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. This Act of 1874 was intended to induce the railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits. The act applied not only to railroad grants in which the term "lands not mineral" did not exclude iron or coal lands, as in this case, but also to similar grants, of which there were several, in which the phrase "not mineral" was used in its usual sense and excluded iron and coal. E. g., see grants to Union Pacific R. R. and Central Pacific, 12 St. 489, 492, c. cxx., § 3; Joint Resolution Jan. 30, 1865, 13 Stat. 567. It would seem to be impossible, therefore, to give a meaning to the phrase "not mineral" in the Act of 1874 which should mean including coal in some cases and excluding coal in others.

More than this, the settlers who were to be aided by the Act of 1874 were those who made homestead or preemption filings. Coal lands were not subject to such entry or disposition. As the lands which the railroad companies were invited to relinquish could not be known coal lands, it is not to be inferred that Congress intended that the railroad companies should in compensation acquire coal lands by their lieu selections.

This construction of the Act of 1874 accords with the action of the Department of the Interior since its passage. Not until this case had the precise question been mooted so as to invoke a formal decision of the Secretary; but the record discloses that it has been the uniform practice of the General Land Office in its printed forms furnished under the act to confine such lieu selections to lands not

known to contain coal, iron or other minerals, and that railroad companies generally have acquiesced therein by furnishing proofs of the non-coal and iron character of the land selected.

It has also been insisted on behalf of the Secretary that the discretion vested in him by Congress in supervising the selection of lieu lands and in executing the laws of 1866 and 1874 is quasi judicial, and that it may not be controlled through mandamus or injunction by the Courts, unless his conclusion can be said to be capricious or arbitrary, or so unreasonable as not to be debatable. To sustain this claim, the cases of *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324; *Ness* v. *Fisher,* 223 U. S. 683, 692; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555, and *Hall* v. *Payne,* 254 U. S. 343, and a number of earlier cases are cited. See *Brown* v. *Hitchock,* 173 U. S. 473, 478. It may be that the authority of these cases would require us to yield to the contention made on behalf of the Secretary in this regard. We are not, however, required to decide this point. The case against the construction of the Act of 1874 urged by the Railroad Company is so clear that we prefer to put our decision directly on the merits of that issue.

Affirmed.

COOKE *v.* UNITED STATES.

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

No. 311. Argued March 20, 1925.—Decided April 13, 1925.

1. On the day following a trial in the District Court in which a verdict had been rendered against his client, in a case in which other necessary proceedings remained pending, and while the court was engaged in trying another case, but during a short recess, an attorney at law addressed a letter, marked "personal," to the District Judge and caused it to be delivered to him at his chambers next the court room, in which the writer not only advised the

judge of the desire of his client to have another judge try four other cases yet to be heard, and of his own desire to avoid the necessity of filing in those cases an affidavit of bias under § 21, Judicial Code, by inducing the judge voluntarily to withdraw, but also evinced his heat over the judge's conduct in the case lately tried and characterized it in severe language personally derogatory to the judge. *Held* that in the latter aspects the letter was contemptuous. P. 532.

2. When a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. *Ex parte Terry,* 128 U. S. 289. P. 534.
3. But where the contempt was not in open court, though constituting "misbehavior in the presence of the court" within the meaning of Rev. Stats. § 725, due process of law requires charges and that the accused be advised of them and be given a reasonable opportunity to defend or explain, with the assistance of counsel, if requested, and the right to call witnesses in proof of exculpation or extenuation. P. 535.
4. Where the alleged contumacy was committed by sending a letter to the judge in chambers, and eleven days thereafter an order reciting the facts and adjudging contempt was entered and an attachment thereupon issued under which the accused was arrested forthwith and brought before the court and, upon admitting authorship of the letter, was pronounced guilty because of it and of extraneous facts referred to by the judge as in aggravation, and was forthwith punished, without being allowed to secure and consult counsel, prepare his defense and call witnesses, or to make a full personal explanation,—*Held* that the procedure was unfair and oppressive and not due process of law. P. 537.
5. Where conditions do not make it impracticable and the delay will not injure public or private rights, a judge, in a case of contempt consisting of a personal attack upon himself, may properly ask that the matter be heard by a fellow judge. P. 539.
6. In this case, *decided* that the judge who imposed the sentence reversed should invite the Senior Circuit Judge of the Circuit to assign another judge to sit in the second hearing. P. 539.

295 Fed. 292, reversed.

Clay Cooke and J. L. Walker were each sentenced for thirty days' imprisonment for contempt by the United

States District Court for the Northern District of Texas. The case was taken on error to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the sentence of Cooke and reversed that of Walker. By certiorari, Cooke's sentence was brought here.

Walker was defendant in a series of suits growing out of the bankruptcy of the Walker Grain Company. One of the cases, numbered 984, after a long jury trial resulted in a verdict against Walker of $56,000. The next day, while the court was open and engaged in the trial of another cause, and during a ten minutes' recess for rest and refreshments, Walker, by direction of Cooke, delivered to the District Judge in his chambers, adjoining the court room, and within a few feet of it, a letter marked "Personal", as follows:

"Fort Worth, Texas, February 15, 1923.

"Hon. James C. Wilson,
Judge U. S. District Court,
Fort Worth, Texas.

"Dear Sir:

"In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; in re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker, in re No. 1001, in Bankruptcy, Walker Grain Company.

"Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

"You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers' & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

"I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

"Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

"Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

"My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the mat-

ters herein presented, so that further steps may be avoided.

"With very great respect, I beg to remain,

"Yours most truly,

CLAY COOKE."

Eleven days after this, on the 26th of February, the court directed an order to be entered with a recital of facts concluding as follows:

"Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect that the judge of this Court has allowed himself to be improperly approached and influenced and whispered to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior, and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt."

The marshal arrested the defendants and brought them to court. The following statement shows in substance what then occurred:

"Judge Wilson: At this time I will call the contempt matter against Clay Cooke and J. L. Walker, attachment having been issued for these respondents.

"I have requested Judge J. M. McCormick, of Dallas, to be present and act as a friend of the Court in this proceeding, and have also requested the District Attorney, it being in its nature a criminal matter, to act."

Mr. Clay Cooke said that he had not known of the attachment until that morning, that he would like time to prepare for trial and get witnesses for their defense, that there might be extenuating circumstances which would appeal to the court's sense of fairness and justice in fixing whatever penalty might be imposed and that he had attempted to secure counsel but through illness or absence of those he sought he had failed up to that time.

Judge Wilson intimated that he would not postpone the matter, and said:

"There is just this question involved, and as stated by counsel representing the Court, these facts are within the personal knowledge of this Court. Did you deliver this letter to the Judge of this Court?

"Mr. Clay Cooke: Is your Honor asking me?

"Judge Wilson: I am stating the question—and does that under the law constitute contempt? If you have any defense, you have not suggested any. This Court would be glad to give you ample time to file any pleadings pertinent and secure any evidence that might support or tend to support it, but unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward, and you are fully protected, since the higher Courts are open to you to correct any error, even to the Supreme Court, that the Judge of this Court might commit here. Now if you have any defense that is pertinent to this order, state what it is."

Mr. Cooke began to dictate a statement to be filed by him, to the effect that he and Walker believed that they had a good defense, and that the matters of fact stated

in the letter as to the bias and prejudice of the judge were true.

"The Court: That does not constitute any defense.

"Mr. Clay Cooke: I'll state then something otherwise—

"Judge Wilson: Repeating the insult does not constitute any defense.

"Mr. Clay Cooke: I am not trying to repeat the insult, if your Honor please . . . I am now stating my good faith.

"Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

"Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson—

"Judge Wilson: That is a matter that is wholly immaterial here it don't make any difference how friendly.

"Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter—

"Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

"Mr. Clay Cooke: I am going to state why I did not proceed—

"Judge Wilson: That does not constitute any defense to this contempt charge.

"Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

"Judge Wilson: You may.

"Mr. Clay Cooke: That affiant wrote said letter without any intention on his part of incurring contempt proceedings and without any thought of contempt and believed that said letter would not be so construed. That affiant has the highest regard for this Court as a Judge; that affiant believed in good faith the Court had heard things concerning—"

Then Mr. McCormick, for the court, interposed an objection that there ought not to be an accentuation of the contempt in the letter by a repetition of innuendoes and reflections on the court or by including them in the record.

Mr. Clay Cooke said he had dictated and sent the letter after advising with reputable counsel who had read it and believed it proper. "The letter itself was not carefully read by myself."

"Judge Wilson: I would like to know who said reputable counsel are."

Mr. Clay Cooke said it was his partner, Mr. Dedmon. He said the letter was dictated and was not read by his client, J. L. Walker, that he had not made the contents public and intended it only for the judge's eye to relieve him from embarrassment, that the purpose was most friendly. After repeating a desire for counsel and the investigation as to the law of contempt in its application to this case, Mr. Cooke referred to the statement he had been attempting to dictate and asked that he might make it fuller because of certain interruptions and to put in anything relevant to his defense.

"You may add—I have not heard any defense suggested here yet, but you may add any, however, if you think of any later. Read the order, Mr. District Attorney."

The District Attorney then read the order for the arrest of the defendants set forth in the record in said cause, the defendants were directed to stand up and the court addressed them as follows:

"Judge Wilson: The findings of fact, all of which are within the personal knowledge of this Court, will be made in the order entered:

"Now, gentlemen, it is a matter almost of common knowledge that the Courts may be lawfully criticised the same as any other branch of the government, and that it is not unlawful or a contempt of the Court for any person, including newspapers, to pass criticisms upon the judiciary, including the Federal Courts and the judges regardless of their truth or falsity, when those criticisms are concerning past matters not at the time pending in the Courts. This law is based upon sound principle. Every branch of the Government needs constructive criticism; when it is such it is wholesome and helpful; no judge I think welcomes it more nor fears it less than the Judge of this Court. But it is altogether a different proposition and is unlawful and clearly constitutes a contempt of Court for any litigant or attorney to pass such in the presence of the Court, not in a respectful, but in a contemptuous and slanderous manner concerning matters then pending and later to be disposed of by the Court.

"It is obvious upon a reading of this letter that you deliberately designed to improperly influence the Court in these pending matters wherein no disqualification is suggested, and you were very careful to suggest that the Court was not disqualified in certain matters, and it is the view of the Court that it was your thought and aim to destroy the independence and the very impartiality of the Court as to those matters.

"And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as an attorney of this Court, in many respects, has been reprehensible. You have filled your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy entered into a corrupt conspiracy to do

many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the marshal of this Court, you both of you being a party to it, employed a private detective to follow and shadow them with a view of reporting to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employed this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in said cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced as a juror in this case—

"Mr. J. L. Walker: Your Honor, pardon me, but I would like to state that J. L. Walker did but what he is in position to prove, and I have it in my pocket—

"—Mr. Marshal, cause this man to desist.

"Mr. J. L. Walker: I beg your pardon I thought I had the right to speak now.

"Judge Wilson: No, you haven't got a right. Your time to reply is passed.

"In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statement in it that this Court had permitted himself to be improperly influenced and whispered to by interested parties against a litigant in this Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

"Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that

you did not state more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine—

"Mr. McCormick: I doubt whether your Honor has the authority to assess both fine and imprisonment. The statute says you may punish by 'fine or imprisonment.' I believe I would suggest that you visit such fine as you see fit, or such imprisonment, but not both.

"Judge Wilson: I assess a punishment of thirty days against each of these respondents."

Mr. Cooke asked that a bond be fixed pending appeal.

"Mr. McCormick: An appeal does not lie in such a case. The evidence, gentlemen, if at all, must be reviewed by writ of error, if reviewed at all.

"Mr. Clay Cooke: The statement of the Court is he will consider a writ of error or appeal. In this case we will have sixty days—

"Judge Wilson: Take these respondents to jail, Mr. Marshal.

"Mr. McCormick: If they are going to take the full sixty days on the matter—

"Judge Wilson: No, there is not going to be any sixty days, the higher Court is going to pass upon this matter at once. . . .

"Mr. Dedmon: Did your Honor fix the amount of the bond?

"Judge Wilson: One thousand dollars. I am not allowing them bond, not releasing the defendants. It is a writ of error bond.

"Mr. Dedmon: You mean you are not going to let them appeal from the order adjudging them to spend thirty days in jail?

"Judge Wilson: If they perfect this appeal, I might release them from jail—show that they are going to appeal it and do it in a hurry."

Mr. Edwin C. Brandenburg, with whom *Messrs J. A. Templeton, G. A. Stultz, W. E. Spell,* and *E. Howard McCaleb* were on the brief, for petitioner.

Petitioner's conviction was obtained without due process of law.

He was sentenced without any affidavit or other authentic charge being brought against him, or any notice of the offense charged, *Phillips S. & T., Co.,* v. *Amalgamated Ass'n.,* 208 Fed. 335; *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936.

Even the purported charge states no offense against the laws of the United States. If everything in the purported charge were admitted to be true, it would merely mean that the judge held certain private "views" as to certain private, confidential acts of the defendant, and these views might or might not be justified by the facts. *Ex parte Hudgins,* 249 U. S. 378; *Ex parte Craig,* 274 Fed. 185.

Petitioner was not informed of the nature and cause of the accusation. The statute was in no respect complied with. The petitioner was arrested on a warrant that neither charged an offense nor contained a certified copy of any charge, and was immediately committed to jail for 30 days. *Sona* v. *Aluminum Castings Co.,* supra; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Ex parte Robinson,* 19 Wall. 505; *Windsor* v. *McVeigh,* 93 U. S. 274; *Galpin* v. *Page,* 18 Wall. 350; *In re Holt,* 55 N. J. L. 384.

Petitioner was denied the assistance of counsel for his defense. No notice was given him of the charge, though the trial judge consumed ten days after receiving the letter in which it appears he engaged the services of a special prosecutor from another city, formulated the charge, prepared for the prosecution; then, after such careful preparation, a marshal is sent out to bring petitioner under arrest *instanter* before the court, where he

is denied all reasonable opportunity to consult counsel, or to obtain the assistance of counsel for his defense. The fact that this is a criminal prosecution and that defendant was denied the assistance of counsel for his defense can not be, and is not, denied. It is the assistance of counsel that the Constitution guarantees. The right of counsel, even if granted, without the right of consultation is barren and fruitless. The arrest, the alleged hearing, the conviction and the incarceration of defendant all occurred in a very short space of time in the forenoon, and defendant during all of that time was in the custody of the marshal or before the bar of the court in custody, with no opportunity either to employ or consult with counsel.

Defendant was not allowed to plead to the charge, and the common law right to purge himself by his oath was denied him. *Craig* v. *Hecht,* 260 U. S. 714. The only objection to the letter apparently urged in the purported charge is the statement of the defendant's former opinion that the judge was big enough and broad enough to overcome the bias and prejudice admittedly existing, and the conclusion that he was mistaken therein. This is not a contempt. It is merely the statement of a truth, which this record clearly discloses. It is an unfortunate situation that a lawyer may, with flattery and praise, seek to and actually influence judicial action, but he cannot speak the truth with candor without being sent to jail. This is not as it should be. *Ex parte Robinson, supra; Hovey* v. *Elliott,* 167 U. S. 409; *McVeigh* v. *United States,* 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 277; *Galpin* v. *Page,* 18 Wall. 350; *In re Pittman,* 1 Curt. (U. S.) 186.

Petitioner was convicted without being confronted by any witnesses or evidence against him, and there is no evidence of guilt in the record to sustain the conviction.

The record on appeal was wrongfully altered after the appeal was perfected by arbitrarily striking out defend-

ant's answer and motion in arrest of judgment, and for a new trial; and the court's refusal to act on the same was a refusal to perform the duties required of it by law; and striking the papers from the record on appeal after appeal was perfected was an invasion of the province and jurisdiction of appellate courts, and deprived petitioner of substantial legal rights. A sentence imposed for an offense not charged is void.

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

Petitioner was guilty of contempt, § 725, Rev. Stats. This act is not the source, of course, of the power of the federal courts to punish contempts. It but restricts their inherent power. Under it they can only punish as contempt "the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

Petitioner's act in writing and delivering the letter, was in the "presence of the court." *In re Savin, Petitioner,* 131 U. S. 267. It was also "misbehavior" to say to the judge in writing, as the petitioner here did, that in a case just ended and in which a motion for a new trial was pending, he had proved himself not big enough and not broad enough to restrain his bias and prejudice against a litigant; that in his conduct of the trial he had manifested such prejudice and bias; and that he was possessed of this prejudice and bias against the litigant because he had permitted slanders to be whispered in his ears; to say to the judge that the petitioner's hopes that the judge would conduct himself as a judge should had been shattered by the judge's conduct, and not only shattered but rudely shattered; to say all of these things, and in substance they were all said in the petitioner's letter, was patently to offer insult to the court and openly to impeach his honor both as judge and man. Certainly it is no defense

to say that there were parts of the letter that were not improper, or that much of it might lawfully have been incorporated in an affidavit to disqualify the judge in cases not yet tried. There remains the offending language which had no reference to the cases yet for trial but referred solely to the case still pending on motion for new trial.

Petitioner was accorded a fair hearing. The word "warrant" as used in the Fourth Amendment has never been held to include an attachment to answer for contempt of court. It has been repeatedly held that in a case of a direct contempt neither affidavit, notice, rule to show cause, nor other process, is a necessary prerequisite to the court's jurisdiction to punish the contempt. *In re Terry,* 128 U. S. 289. The petitioner waived any objection to the basis of the attachment by pleading orally and in writing to the charge upon its merits. This objection is contained in none of the assignments of error.

Neither *Phillips S. & T. Co.* v. *Amalgamated Ass'n.,* 208 Fed. 335, nor *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936, was a case of direct contempt committed in the presence of the court. No formal charge whatever was necessary in case of a contempt committed in the presence of the court. The statute does not require that the "misbehavior," if committed in the presence of the court, must *also* be of such character as to "obstruct the administration of justice." That qualification is required only as to misbehavior not committed "in the presence of the court." *Ex parte Hudgins,* 249 U. S. 378; *Ex parte Craig,* 274 Fed. 177 distinguished.

Article IV of the Amendments providing that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation," is one of those constitutional limitations which this court said in the *Hudgins Case, supra,* did not apply to a contempt committed "in the presence of the

court." Moreover, the record clearly shows that in truth and fact the petitioner was fully informed as to the charge against him before he undertook to state his defense.

As for Article VI, relating to the right of counsel in all criminal prosecutions, the inapplicability of this amendment, with its several guarantees, including that of trial by jury, to a proceeding for the summary punishment of contempt in the presence of the court is so well recognized that discussion of it is idle. One charged with a direct contempt committed in the presence of the court has not the right to plead formally to the charge. Here again the *Hudgins Case* is in point and decisive. The most petitioner was entitled to was opportunity to deny authorship of the offending letter, since it was delivered by the hand of another although in his presence. But he admitted authorship. There was nothing that might have been proper subject matter of any further hearing. Such hearing as he was entitled to he had.

Petitioner was deprived of no legal right by any failure to transmit to the Circuit Court of Appeals what purported to be an answer admittedly offered for filing after writ of error had been allowed.

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

The first objection to the sentence of the court, made on behalf of the petitioner, is that the letter written to the judge is not a contempt of the court. Section 21 of the Judicial Code contains the following:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last

preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

It is said that all that the petitioner intended to do by this letter was to advise the court of the desire of his client to have another judge try the four cases yet to be heard, and of his own desire to avoid the necessity of filing an affidavit of bias under the above section in those cases by inducing the regular judge voluntarily to withdraw. Had the letter contained no more than this, we agree with the Circuit Court of Appeals that it would not have been improper.

But we also agree with that court that the letter as written did more than this. The letter was written the morning after the verdict in the heat of the petitioner's evident indignation at the judge's conduct of the case and the verdict. At least two weeks would elapse before it was necessary to file an affidavit of bias in the other cases.[1] The letter was written and delivered pending further necessary proceedings in the very case which aroused the writer's anger. While it was doubtless intended to notify the judge that he would not be allowed to sit in the other cases, its tenor shows that it was also written to gratify the writer's desire to characterize in severe language, per-

[1] The next term of the court at Forth Worth would have been the second Monday in March (Judicial Code, § 108) so that the affidavit required by § 21 for disqualification need not have been filed before March 2nd. The letter was written February 15th.

sonally derogatory to the judge, his conduct of the pending case. Though the writer addressed the judge throughout as "Your Honor", this did not conceal but emphasized the personal reflection intended. The expression of disappointed hope that the judge was big enough and broad enough to overcome his personal prejudice against petitioner's client and that the client would have the privilege of rebutting the whispered slanders to which the judge had lent his ear, and the declaration that his confidence in the judge had been rudely shattered, were personally condemnatory and were calculated to stir the judge's resentment and anger. Considering the circumstances and the fact that the case was still before the judge, but without intending to foreclose the right of the petitioner to be heard with witnesses and argument on this issue when given an opportunity, we agree with the Circuit Court of Appeals that the letter was contemptuous.

But while we reach this conclusion, we are far from approving the course of the judge in the procedure, or absence of it, adopted by him in sentencing the petitioner. He treated the case as if the objectionable words had been uttered against him in open court.

To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. Such a case had great consideration in the decision of this Court in *Ex parte Terry,* 128 U. S. 289. It was there held that a court of the United States upon the commission of a contempt in open court

might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.

The important distinction between the *Terry Case* and the one at bar is that this contempt was not in open court. This is fully brought out in *Savin, Petitioner,* 131 U. S. 267. The contempt there was an effort to deter a witness, in attendance upon a court of the United States in obedience to a subpoena, while he was in a waiting room for witnesses near the court room, from testifying, and the offering him money in the hallway of the courthouse as an inducement. This was held to be "misbehavior in the presence of the Court", under § 725 R. S. (now § 268 of the Judicial Code). The Court, speaking by Mr. Justice Harlan, said (page 277):

"We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry,* 128 U. S. 289, 309; whereas, in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286."

This difference between the scope of the words of the statute "in the presence of the court," on the one hand, and the meaning of the narrower phrase "under the eye or within the view of the court," or "in open court" or "in the face of the court," or "in *facie curiae*," on the other, is thus clearly indicated and is further elaborated in the opinion.

We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow. Punishment without issue or trial was so contrary to the usual and ordinarily indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal vindication of the dignity of the court created it.

When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the prosecution of such contempts is not important. The Court in *Randall* v. *Brigham*, 7 Wall. 523, 540, in speaking of what was necessary in proceedings against an attorney at law for malpractice said:

"All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

The Court in *Savin, Petitioner,* 131 U. S. 267, applied this rule to proceedings for contempt.

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See *Hollingsworth* v. *Duane,* 12 Fed. Cases 359, 360; *In re Stewart,* 118 La. 827; *Ex parte Clark,* 208 Mo. 121.

The proceeding in this case was not conducted in accordance with the foregoing principles. We have set out at great length in the statement which precedes this opinion the substance of what took place before, at and after the sentence. The first step by the court was an order of attachment and the arrest of the petitioner. It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and after so long a delay, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See *Hollingsworth* v. *Duane,* 12 Fed. Cases 367, 369. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.

After the court elicited from the petitioner the admission that he had written the letter, the court refused him time to secure and consult counsel, prepare his defense and call witnesses, and this although the court itself

had taken time to call in counsel as a friend of the court. The presence of the United States District Attorney also was secured by the court on the ground that it was a criminal case.

The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this, where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court can not exclude evidence in mitigation. It is a proper part of the defense. There was a suggestion in one of the remarks of the petitioner to the court that, while he had dictated the letter he had not read it carefully, and that he had trusted to the advice of his partner in sending it; but he was not given a chance to call witnesses or to make a full statement on this point. He was interrupted by the court or the counsel of the court in every attempted explanation. On the other hand, when the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner.

Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish* v. *The United States,* 299 Fed. 283, 285; *Toledo Company* v. *The United States,* 237 Fed. 986, 988.

The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows. We think, therefore, that when this case again reaches the District Court to which it must be remanded, the judge who imposed the sentence herein should invite the senior circuit judge of the circuit to assign another judge to sit in the second hearing of the charge against the petitioner.

Judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

YEISER *v.* DYSART, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 130. Submitted October 24, 1924.—Decided April 13, 1925.

A State may restrict the fees chargeable by attorneys at law in cases arising under the state workmen's compensation act without depriving them of property or liberty of contract in violation of the Fourteenth Amendment. P. 541.

192 N. W. 953, affirmed.

ERROR to a judgment of the Supreme Court of Nebraska ordering that the right of the plaintiff in error to practise as attorney at law be suspended unless he refund to a client a fee received and paid in violation of a provision of the state workmen's compensation law, providing that in cases thereunder the pay of the attorney should be fixed by the court and invalidating any contract for other and further pay.

John O. Yeiser, pro se.

No brief filed for defendants in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Upon a report of the respondents, a committee of members of the bar, the plaintiff in error was ordered to be suspended from the right to practise as attorney unless he should refund to a client a fee received by him of $620 and interest within a time fixed. The ground of the order was that by § 3031, Comp. St. 1922, only such sum could be demanded for services in bringing a suit under the workmen's compensation act of the State as the Court

should allow, and that a contract for other and further pay was void. The Supreme Court of the State, while crediting the plaintiff in error with an honest belief that the statute had a narrower meaning, made the order complained of, and the case is brought here on a contention that the statute as construed unreasonably restricts the liberty of contract and contravenes the Fourteenth Amendment by depriving the plaintiff in error of his liberty and property without due process of law.

The plaintiff in error recognizes that this Court is bound by the construction given to the State law by the State Court, yet wastes a good deal of argument in the effort to prove the construction wrong. When the constitutional question is reached, late cases are relied upon for the general proposition that unreasonable interference with freedom of contract cannot be sustained. *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Charles Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522. But the question is specific, whether we can pronounce this law unreasonable, against the opinion of the legislature and Supreme Court of the State. The Court adverts to the fact that a large proportion of those who come under the statute have to look to it in case of injury and need to be protected against improvident contracts, in the interest not only of themselves and their families but of the public. A somewhat similar principle has been sanctioned by this Court. *Calhoun* v. *Massie,* 253 U. S. 170. When we add the considerations that an attorney practises under a license from the State and that the subject matter is a right created by statute, it is obvious that the State may attach such conditions to the license in respect of such matters as it believes to be necessary in order to make it a public good. Of course a reasonable time from the issue of the mandate of this Court will be allowed for the plaintiff in error to comply with the judgment affirmed.

Judgment Affirmed.

LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE *v.* LEHIGH VALLEY COAL COMPANY & KATE P. DIXON.

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

No. 222. Argued January 22, 1925.—Decided April 13, 1925.

In a suit by one of two lessors against the lessee to construe and establish the lease and obtain accounting for both lessors, charging fraud by lessee, the other lessor is a necessary, if not an indispensable, party, and, for the purpose of determining original jurisdiction of the District Court through diversity of citizenship, must be aligned with the plaintiff. P. 543.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill for want of jurisdiction.

Mr. H. M. Hitchings and *Mr. Frank Wolcott,* for appellant, submitted.

Mr. Charles W. Pierson, with whom *Mr. Allan McCulloh* and *Mr. Campbell Locke,* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill brought against the Lehigh Valley Coal Company, lessee of a coal mine, by John Alden Lee, who owns one-half of the mine in his own right and as trustee for his brother. Kate P. Dixon owns the other half. The bill seeks a construction of the lease and of an agreement made on behalf of the plaintiff's interest on January 21, 1913; a declaration that certain parts of the agreement are a fraud upon the plaintiff and Kate P. Dixon; an account to the plaintiff and Kate P. Dixon from the Coal Company, and that the lease may be declared to be, and to have been since January 21, 1913, in

full force and effect. The Coal Company is a corporation of Pennsylvania, the plaintiff Lee a citizen and resident of New York, and Kate P. Dixon is a citizen and resident of Pennsylvania. She is made a defendant, the bill alleges, because of her refusal to be made a plaintiff 'and because to make her such party plaintiff would oust the Court of jurisdiction.' The bill was dismissed for want of jurisdiction by the District Court, we presume on the ground that, so far as appeared, the arrangement of the parties was merely a contrivance for the purpose of founding a jurisdiction that otherwise would not exist. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181.

The plaintiff and appellant now argues that Kate P. Dixon is not a necessary party. When a defendant seeks to remove a suit from a State Court to the District Court, of course he is entitled to contend that a party joined by the plaintiff is not a necessary party and therefore does not make the removal impossible by defeating the jurisdiction. *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182. It is a different question whether the plaintiff can repudiate the effect of his own joinder, can retain a party to the relief sought and yet keep him on the wrong side in order to avoid the effect of his own act. Without inquiring whether the plaintiff could have maintained the suit alone had he so elected and had he found it impossible to join Kate P. Dixon, obviously she was a 'necessary' even if not an indispensable party. (*Shields* v. *Barrow*, 17 How. 130, 139.) It would be hard upon the Coal Company to compel it to submit to an adjudication upon the lease, upon a fraud alleged to have been committed against both owners, and to an account, in the absence of one of the lessors. The joinder of both is much more than a mere form. As both are named they must be arranged upon the side on which they belong. *Menefee* v. *Frost*, 123 Fed. 633. *Blacklock* v. *Small*, 127 U. S. 96.

Decree affirmed.

MODERN WOODMEN OF AMERICA *v.* JENNIE V. MIXER.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 308. Submitted March 18, 1925.—Decided April 13, 1925.

1. Becoming a member of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation; and the rights of membership are to be governed by the law of the State of the society's incorporation. P. 551.
2. Hence other States, irrespective of where the certificate of membership was issued, cannot attach to a membership rights against the society which are refused by the law of the domicil. *Id.*
3. Where a by-law of such a corporation provided that absence of any member unheard of should not give any right to recover on any benefit certificate until the member's expectancy of life had expired, and this was upheld by the Supreme Court of its domiciliary State even as against memberships antedating the by-law, *held* that a decision of a court of another State denying it this effect failed to give full faith and credit to the domiciliary charter. *Royal Arcanum* v. *Green,* 237 U. S. 531. *Id.*

197 N. W. 129, reversed.

CERTIORARI to a judgment of the Supreme Court of the State of Nebraska which affirmed a judgment for the plaintiff (here respondent) in an action on a benefit certificate.

Mr. Nelson C. Pratt, with whom *Messrs. Truman Plantz, Frank M. McDavid, George G. Perrin,* and *George H. Davis* were on the briefs, for petitioner.

The question whether payment of assessments shall cease at the expiration of seven years' unexplained absence of the member or shall continue to be paid for the period of the expectancy of life of the member is one which affects the financial interest of every member of the society. *Royal Arcanum* v. *Green,* 237 U. S. 531; *Steen* v. *Modern Woodmen of America,* 296 Ill. 104; *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662.

When the petitioner came into Nebraska it brought its charter with it, and its power to do any given thing is to be determined by that charter and the interpretation of it by the courts of Illinois. The Nebraska courts failed to give full faith and credit to the decision and judgment of the court of Illinois in the case of *Steen* v. *Modern Woodmen,* 296 Ill. 104.

Where either the application or the benefit certificate contains an agreement on behalf of the member to be bound by after-enacted by-laws, after-enacted by-laws are valid and the member is bound thereby.

The application made by the member and the benefit certificate provide that the laws, rules and usages of the society then in force, or which might thereafter be enacted, are part of the contract between the member and the society. The contract, therefore, provided that the member should be bound by all the laws that were legally enacted by the petitioner subsequent to the time of the issuance of his benefit certificate. *Hall* v. *Association,* 69 Neb. 601; *Funk* v. *Stevens,* 102 Neb. 681; *Knights of Pythias* v. *Mims,* 241 U. S. 574; *Apitz* v. *Supreme Lodge,* 274 Ill. 196; *Steen* v. *Modern Woodmen,* 296 Ill. 104; *Thomas* v. *Knights of Maccabees,* 85 Wash. 665; *Hollingsworth* v. *Supreme Council,* 175 N. C. 615; *Reynolds* v. *Supreme Council,* 192 Mass. 150; *Case* v. *Supreme Tribe,* 106 Neb. 220; *Supreme Lodge* v. *Smyth,* 245 U. S. 594; *Langnecker* v. *Grand Lodge,* 111 Wis. 279; *Norton* v. *Catholic Order of Foresters,* 138 Ia: 464; *Korn* v. *Mutual Assurance Society,* 6 Cranch 192; *Crites* v. *Modern Woodmen,* 82 Neb. 298; *Hartford Life Insurance Co.* v. *Ibs,* 237 U. S. 662; *Supreme Council* v. *Green,* 237 U. S. 531; *Hartford Life Insurance Co.* v. *Barber,* 245 U. S. 146.

The statutes of the State of incorporation, the charter or articles of association, benefit certificate and laws of

the society enter into and are parts of the contract of membership between a fraternal beneficiary society and its membership. *Baldwin* v. *Begley,* 185 Ill. 180; *Fulenweider* v. *Royal League,* 180 Ill. 621; *Sabin* v. *Phinney,* 134 N. Y. 423; *Shipman* v. *Protected Home Circle,* 174 N. Y. 398; *Union Mutual Association* v. *Montgomery,* 70 Mich. 587; *Supreme Lodge* v. *LaMalta,* 95 Tenn. 157; *Gaines* v. *Supreme Council,* 140 Fed. 978; *Van Schoonhoven* v. *Curley,* 86 N. Y. 187; *Sharpe* v. *Grand Lodge,* 108 Neb. 193; *Farmers* v. *Kinney,* 64 Neb. 808; *Relfe* v. *Rundle,* 103 U. S. 222; *Kirkpatrick* v. *Modern Woodmen,* 103 Ill. App. 468.

The provisions of the Constitution and of the act of Congress by which the judgments of one State are to have faith and credit given them in another State establish a rule of evidence rather than of jurisdiction. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265; *Steen* v. *Modern Woodmen, supra; Harrison* v. *Insurance Co.,* 102 Ia. 112; *Russ* v. *War Eagle,* 14 Ia. 363; *Mobile, Jackson & P. C. R. R. Co.* v. *Turnipseed,* 219 U. S. 35;

There is no vested right in a rule of evidence, and parties may by contract provide that a different rule shall apply in determining controversies that may arise between them. *Roeh* v. *Business Men's Association,* 164 Ia. 199; *Steen* v. *Modern Woodmen, supra; Chicago, B. & Q. R. R.* v. *Jones,* 149 Ill. 361; *Lundberg* v. *Interstate Business Men's Ass'n.,* 162 Wis. 474; *People* v. *Rose,* 207 Ill. 352; *Chicago Transfer R. R.* v. *Chicago,* 217 Ill. 343; *Munn* v. *Illinois,* 94 U. S. 113; *Western Union* v. *Comm. Mill Co.,* 218 U. S. 406; *Martin* v. *Railroad Co.,* 203 U. S. 284.

The petitioner in transacting business in its home State is controlled by its charter, as interpreted by the courts of such home State, and, in a like manner when it transacts business in a State other than the State of its incorporation, it necessarily carries its charter with it, for that is the law of its existence. *Royal Arcanum* v. *Green,*

237 U. S. 531; *Reynolds* v. *Arcanum,* 192 Mass. 150; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662; *Hollingsworth* v. *Supreme Council* 175 N. C. 615; *Sovereign Camp W. O. W.* v. *Wirts,* 254 S. W. (Tex.) 637; *McClement* v. *Supreme Court I. O. F.,* 222 N. Y. 470; *Supreme Council* v. *Gallery,* 278 Fed. 500; *Canada Southern R. R.* v. *Gebhard,* 109 U. S. 527; *Nashua Sav. Bank* v. *Anglo-American Loan Co.,* 189 U. S. 221; *Bernheimer* v. *Converse,* 206 U. S. 516; *Palmer* v. *Welsh,* 132 Ill. 141; *Supreme Lodge* v. *Hine,* 82 Conn. 315; *Supreme Colony* v. *Towne,* 87 Conn. 644; *Relfe* v. *Rundle,* 103 U. S. 222; *North American Union* v. *Johnson,* 142 Ark. 378.

The right of a corporation to modify the terms of a contract of membership depends upon the power of the corporation. *Supreme Lodge K. of P.* v. *Knight,* 117 Ind. 489; *Wright* v. *Minnesota Mutual Life Ins. Co.,* 193 U. S. 657; *Korn* v. *Society,* 6 Cranch 192; *Society* v. *Korn,* 7 Cranch 396.

The full faith and credit clause requires that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home. *Smithsonian Institute* v. *St. John,* 214 U. S. 19; *Railroad Co.* v. *Wiggins Ferry Co.,* 119 U. S. 615; *Hancock National Bank* v. *Farnam,* 176 U. S. 640; *Flash* v. *Conn,* 109 U. S. 371; *Royal Arcanum* v. *Green,* 237 U. S. 531; *Graham* v. *First National Bank,* 84 N. Y. 393; *Canada Southern R. R.* v. *Gebhard,* 109 U. S. 527.

If the legislature has not limited the charter powers of foreign beneficiary societies, the charter as interpreted by the courts of the home State is controlling. *Thomas* v. *Matthiessen,* 232 U. S. 221; *Nat. Bldg. & Loan Assn.* v. *Brahan,* 193 U. S. 635; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Pinney* v. *Nelson,* 183 U. S. 144; *Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Nelson* v. *Nederland Life Ins. Co.,* 110 Ia. 600; *American Fidelity Co.* v. *Bleak-*

ley, 157 Ia. 442; *Dworak* v. *Supreme Lodge,* 101 Neb. 297; *Dolan* v. *Supreme Council,* 152 Mich. 266; *Weiditschka* v. *Maccabees,* 188 Ia. 183; *Dennis* v. *Modern Brotherhood,* 119 Mo. App. 210; distinguishing *McElroy* v. *Insurance Co.,* 84 Neb. 866; *Rye* v. *New York Life Ins. Co.,* 88 Neb. 707; *Mutual Life Insurance Co.* v. *Cohen,* 179 U. S. 262; *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551; *American Fidelity Co.* v. *Bleakley,* 157 Ia. 442; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530.

Mr. J. J. McCarthy and *Mr. George W. Leamer* for respondent, submitted.

The case should have been brought up by a writ of error instead of certiorari. Judicial Code § 237, as amended by Act of Feb. 17, 1922, 42 Stat. 366.

The contract sued upon was delivered and first became effective in the State of South Dakota. There is neither pleading nor proof as to the laws of that State. The law of South Dakota is therefore presumed to be the same as the law of Nebraska. This is true as to both statutory and common law. *Stark* v. *Olsen,* 44 Neb. 646; *Council Bluffs* v. *Griswold,* 50 Neb. 753; *Bannard* v. *Duncan,* 79 Neb. 189; *Haggin* v. *Haggin,* 35 Neb. 375; *Scroggin* v. *McClelland,* 37 Neb. 644; *Chapman* v. *Brewer,* 43 Neb. 890; *Smith* v. *Mason,* 44 Neb. 610.

The presumption must therefore be indulged that the by-law relied upon by the appellant is, under the law of South Dakota, unreasonable, void and of no effect; because that is the conclusion reached by the court of Nebraska. *Mixer* v. *M. W. A.,* 197 N. W. 129 (this case); *Garrison* v. *M. W. A.,* 105 N. W. 25; 178 N. W. 842.

The contract in suit should be construed and enforced according to the law of the place where made.

The record shows that the insured made application to the local camp at Elk Point, South Dakota, to become a

member thereof, and provided in his application that no right should accrue to him until he had been adopted and made the payments required at adoption, and that the certificate should only be delivered to him after adoption, all in accordance with the by-laws of the society; and the endorsement upon the certificate shows that this is what was done, and that when he was adopted into the local camp the certificate was delivered to him and he accepted it and paid the dues and charges required. So that all of the acts which made the certificate a contract took place in South Dakota, and not in the State of Illinois, the appellant acting by and through its local camp and the officers thereof as its agents, and the insured acting for himself. It is therefore quite immaterial that the Constitution of the United States provides that full faith and credit must be given to certain records and acts of each State when they become important in some other State.

The general rule is that the construction of a contract of insurance and the rights and obligations of the parties thereto must be determined by the law of the place where the contract is made. *Equitable Life Assurance Society* v. *Pettus,* 140 U. S. 228; *Mutual Life Ins. Co.* v. *Cohen,* 179 U. S. 263; *Supreme Council* v. *Meyer,* 198 U. S. 508; *Life Ins. Co.* v. *McCue,* 223 U. S. 234; *Ingersol* v. *Ins. Co.,* 156 Ill. App. 568; *Wilde* v. *Wilde,* 95 N. E. 295; *Green* v. *Supreme Council,* 124 N. Y. S. 398; *Head* v. *Ins. Co.,* 147 S. W. 827 (Mo.).

The rule of law in Nebraska is that seven years of unexplained absence is presumption of death, and this petitioner attempted by a private contract in the way of a by-law to change the law of Nebraska. Nebraska courts have held this by-law unreasonable. If Nebraska shall be compelled to follow the Illinois decision, then all foreign corporations will have an advantage over domestic corporations.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit by the beneficiary of a certificate issued by a fraternal beneficiary society incorporated in Illinois. The member to whom the certificate was issued was the plaintiff's husband and the ground of recovery is that the husband had disappeared and had not been heard of for ten years before this suit was brought. His expectancy of life according to the tables had not expired and the defence is a by-law of the Corporation to the effect that "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired, . . . and this law shall be in full force and effect any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding."

The only facts that need be mentioned are that the certificate seems to have been issued in South Dakota, although there was no allegation or proof concerning the law of that State, and that it was issued in 1901, while the by-law relied upon was not adopted until 1908. But the by-law has been held valid and binding upon the members of the Corporation by the Supreme Court of Illinois, although they had become members before the change. *Steen* v. *Modern Woodmen of America,* 296 Ill. 104. The Supreme Court of Nebraska affirmed a judgment for the plaintiff, seemingly, from the cases cited, on the ground either that the rule of evidence must be determined by the *lex fori,* or, more probably, that the by-law was unreasonable. 197 N. W. 129. The result is that if the validity of the by-law ought to be determined by the laws of Illinois, the plaintiff is allowed to recover upon a state of facts which the contract expressly stipu-

lates shall not give her that right. A writ of certiorari was issued by this Court. 265 U. S. 576.

The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531, 542. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation. We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State. In the above cited case Green became a member of a Massachusetts corporation in New York, and the State Court held on ordinary principles of contract that his rights were governed by New York law. *Green* v. *Royal Arcanum,* 206 N. Y. 591, 597. But the decision was reversed and it was held a failure to give full faith and credit to the Massachusetts charter as construed by the Massachusetts Court that Green was relieved by decree from paying assessments increased by the corporation after his contract was made. We are of opinion that the decision in that case governs this, and that the judgment must be reversed.

Judgment reversed.

CHAS. WOLFF PACKING COMPANY *v.* THE COURT OF INDUSTRIAL RELATIONS OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 207 & 299. Argued Nov. 20, 1924.—Decided April 13, 1925.

1. When a judgment entered by a state court is modified by another entered after a rehearing, the second supersedes the first, and a writ of error to the second alone is proper for review in this Court. P. 561.
2. A decision of a state Supreme Court that provisions of a statute of the State are separable is conclusive on this Court in the case. P. 562.
3. A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.

Held that the former decision of this Court in this case (262 U. S. 522) holding the Kansas Industrial Relations Act unconstitutional in so far as it permitted the fixing of wages in plaintiff in error's packing plant, and reversing the judgment of the Kansas Supreme Court for that reason, was neither an adjudication that the entire act was invalid nor an adjudication that its provisions for fixing hours of labor were valid. P. 562.

4. The Industrial Relations Act of Kansas, which seeks to promote continuity of operation and production in the industries to which it relates by compelling employer and employees to submit their controversies to compulsory settlement by a state agency, is, as applied to a manufacturer of food products, unconstitutional, not only so far as it permits compulsory fixing of wages, (as previously decided, 262 U. S. 522,) but also, and for the same reasons, in the provision for compulsory fixing of hours of labor, since the compulsion in both these features alike is but part of a system by which the act seeks to compel owner and employees to continue in business on terms not of their own making, which infringes the rights of property and liberty of contract guaranteed by the due process of law clause of the Fourteenth Amendment. P. 563.
5. Whether a power conferred on a state agency to fix hours of labor would be valid if it were conferred independently, and made either general or applicable to all business of a particular class, is not considered. P. 569.

114 Kans. 304, 487, reversed.

ERROR to a judgment of the Supreme Court of Kansas entered, upon rehearing, after receipt of the mandate issued from this Court upon a previous reversal, 262 U. S. 522. The judgment awarded a mandamus to compel obedience to an order of the Kansas administrative agency called the Court of Industrial Relations, in so far as it purported to fix the hours of labor and pay for over time in the meat packing plant of the plaintiff in error.

Mr. D. R. Hite, with whom *Messrs. John S. Dean* and *Harry W. Colmery* were on the brief, for plaintiff in error.

The mandate and judgment of this Court required the vacation of the judgment of the Kansas Supreme Court as a whole and did not authorize its modification upon the original record, § 709 Rev. Stats.; *Cowdrey* v. *Bank,* 139 Cal. 293; *Davis* v. *Healey,* 22 N. J. 115.

The object of the Industrial Court Act is the compulsory arbitration of disputes between employers and employees in designated industries, endangering continuity of operation of such industries. The act was not concerned with the health of employees engaged in operating such industries. *Howat's Case,* 109 Kan. 376; *Industrial Court* v. *Packing Co.,* 109 Kan. 645; *Industrial Court* v. *Packing Co.,* 111 Kan. 501; *Dorchy* v. *Kansas,* 264 U. S. 286; *Packing Co.* v. *Industrial Court,* 262 U. S. 522.

Bunting v. *Oregon,* 243 U. S. 426, is not authority for upholding the order of the industrial court fixing hours and conditions of labor. *Packing Co.* v. *Industrial Court,* 262 U. S. 522; *Lochner* v. *New York,* 198 U. S. 45; *Dorchy* v. *Kansas, supra; Adkins* v. *Childrens Hospital,* 261 U. S. 525.

Considered as a statute authorizing an order fixing hours and conditions of labor for packing house employees, the act creating the Court of Industrial Relations encounters the Fourteenth Amendment. *Packing Co.* v. *In-*

dustrial Court, supra; Lochner v. *New York, supra; Dorchy* v. *Kansas, supra; Allgeyer* v. *Louisiana,* 165 U. S. 578; *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1; *Truax* v. *Raich,* 239 U. S. 33; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530; *Smyth* v. *Ames,* 169 U. S. 467; *Hairston* v. *D. & W. Ry. Co.* 208 U. S. 606; *Mugler* v. *Kansas,* 123 U. S. 661; *St. Louis Ry. Co.* v. *Arkansas,* 235 U. S. 350; *People* v. *Road Co.* 9 Mich. 285; *Cooley's Const. Lim'ns.* 7th ed. p. 838; *Brick Co.* v. *Perry,* 69 Kan. 300; *Howard* v. *Schwartz,* 77 Kan. 609.

The parts of the order sustained by the Kansas Supreme Court are void because the necessary effect is to increase the operating expenses of the packing company against its will, notwithstanding the income of the company was and is insufficient to pay the cost of raw material and operating expenses, including the increase of wages required to be paid by such order. *Reagan* v. *Farmers Loan & Trust Co.* 154 U. S. 362; *Railway Co.* v. *Mills,* 253 U. S. 206; *Pa. Coal Co.* v. *Mahon,* 260 U. S. 393.

Mr. John G. Egan and *Mr. Chester I. Long,* with whom *Messrs. Charles B. Griffith, Randal C. Harvey* and *Austin M. Cowan* were on the brief, for defendant in error.

After reversal and direction to take further proceedings not inconsistent with the opinion of the Supreme Court of the United States, a state court has authority to determine questions not decided by the higher court and to modify its judgment accordingly. The authorities uniformly hold that a judgment of reversal is not an adjudication of any question other than the one actually discussed and decided. *Mutual Life Ins. Co.* v. *Illinois,* 193 U. S. 551; *Erie Ry. Co.* v. *Western Trans. Co.* 204 U. S. 220. See also: *In re Potts,* 166 U. S. 263; *Murphy* v. *Utler,* 186 U. S. 99; *Sou. Building Etc., Co.* v. *Carey,* 117 Fed. 325; *Gt. Northern Ry. Co.* v. *West. Union Tel. Co.,*

174 Fed. 321; *Taenzer* v. *Railway Co.* 191 Fed. 543; *General Inv. Co.* v. *Ry. Co.* 269 Fed. 235. The application of the rule to the case at bar is exemplified by the recent case of *Hallanan* v. *Eureka Pipe Line Co.*, 261 U. S. 393.

In the cases cited above, no distinction is made in cases where further evidence was introduced and the pleadings amended in the lower court and those where no further proceedings were had except the entering of a decree pursuant to the mandate. The question of the validity of the statute and order relating to hours of labor was not determined by this court in the former appeal.

The Kansas Industrial Court law, in so far as it authorizes fixing hours of labor in plaintiff in error's packing plant and penalizes overtime, is valid. The Supreme Court of Kansas, from the start of this litigation, has interpreted the statute as having among its purposes the protection of the health of the workers, and has recognized the fixing of hours of labor as a method of protecting their health. That Court has construed the statute to empower the Court of Industrial Relations to take jurisdiction of this controversy between the Wolff Packing Company and its employees over hours of labor. This jurisdiction can be sustained though the provision of the statute declaring the packing industry to be affected with a public interest be ignored.

The opinion of this Court when this case was here before did not say that the business of meat packing might not to any extent be affected with a public interest. The opinion does not intimate that the legislature may not to some extent remove obstacles to the continued or efficient operation or service of the meat packing industry. That the State may to some extent at least remove such obstacles is plain from the establishment by States and by National Government of boards of mediation, conciliation or arbitration to settle disputes between employers and employees.

In addition to taking jurisdiction of a controversy which may endanger the continuity or efficiency of service of the meat packing industry, the Court of Industrial Relations may, under § 7 of the act, take jurisdiction of a controversy that may "affect the production or transportation of the necessaries of life affected or produced by said industries or employments, or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries, employments, public utilities or common carriers, and thereby endanger the public peace or threaten the public health."

For the purpose of this argument, we can pass the question as to the power of the Court of Industrial Relations to take jurisdiction of a controversy which "may endanger the continuity or efficiency of service of any of said industries," and consider the other cases where, under § 7, it may take jurisdiction. To some extent the State may intervene to keep open a market to its producers of live stock, to protect the supply of meat food, to prevent the obstruction, crippling or breaking down of the meat-packing industry and the interruption or the loss of employment of the workers therein. An injury to the employer in the industry or to the employees is an injury to public welfare. The interruption or loss of employment of the workers means a deprivation to them and their families and a blow to the prosperity of the community in which they live.

The dispute at this plant concerning hours of labor presented a controversy that affected the production of the necessaries of life produced at the plant, caused industrial strife, disorder and waste, injured the orderly operation of the plant, and thereby endangered the public peace and threatened the public health. The facts presented in the controversy come within the provisions of § 7 authorizing the Court of Industrial Relations to take jurisdiction. The dispute over hours of labor was one of

the grounds of the controversy. The court properly took jurisdiction and ordered relief which, if carried out, would remove one of the causes of the controversy and would do away with injuriously long hours of labor. This relief was within the purview of the statute and within the power of the State.

The act is uniform in its operation and there is no denial of the equal protection of the laws. *Radice* v. *New York,* 264 U. S. 292. All manufacturers of food products are equally subject to the Industrial Court law, so far as it is valid.

Hours of labor in packing plants are a proper subject for regulations under the police power. *Holden* v. *Hardy,* 169 U. S. 366; *Bunting* v. *Oregon,* 243 U. S. 426; *Adkins* v. *Childrens Hospital,* 261 U. S. 525; *Radice* v. *New York, supra.* The Court of Industrial Relations has found the fact that prolonged hours of labor are detrimental to the health of the worker, and to the public welfare, in the plant of the plaintiff in error, and this finding is supported by the evidence in the record, and has been approved by the Kansas Supreme Court. This finding is entitled to the same consideration given that of the legislature in *Holden* v. *Hardy, supra; Bunting* v. *Oregon, supra; Radice* v. *New York, supra.* But the validity of the order in question concerning hours does not depend in any respect on the public interest or lack of public interest in the meat packing industry. This was important on the question of wages, but not as to hours of labor. In neither the *Holden, Bunting* nor *Radice* cases, cited above, was the nature of the business considered except its effect on the health of the worker, and practically all the industries affected thereby were impressed with no public interest whatever, and certainly not as much as is conceded to the packing industry in the first decision of this case. Hours of labor is a proper subject for regulation in any industry where prolonged hours are detrimental to the

health of the workers. The portions of the statute relating to hours are valid despite the invalidity of the wage-fixing provisions. *Dorchy* v. *Kansas, supra; State* v. *Howat,* 107 Kan. 423; *State, ex rel.,* v. *Howat,* 109 Kan. 376; *The State* v. *Howat,* 116 Kan. 412.

There is no inconsistency between these decisions and the case of *Hill* v. *Wallace,* 259 U. S. 44, where this Court found invalid certain sections of the futures trading act (c. 76, 42 Stat., 178), and likewise found other sections invalid because so interwoven with the invalid regulations that they could not be separated. See *United States* v. *Reese,* 92 U. S. 214. All that is necessary here, and all that has been done by the State Supreme Court, is to strike out the invalid word " wages " and the invalid provisions relating to wages only. An important distinction between this case and the cases of *Hill* v. *Wallace* and *United States* v. *Reese,* is that in both of those cases a federal statute was involved, and it was the primary duty of this Court to decide whether such statutes were severable. But in the case at bar a state statute is involved, and the duty of determining its severability falls upon the state court, and the state court has held the statute to be severable. The order affects women as well as men.

Freedom of contract as to hours of labor must yield to police power. *Wilson* v. *New,* 243 U. S. 332; *Bunting* v. *Oregon, supra; B. & O. R. R. Co.* v. *I. C. C.,* 221 U. S. 612; *M. K. & T.* v. *United States,* 231 U. S. 112; *Holden* v. *Hardy, supra; Mueller* v. *Ore.,* 208 U. S. 412; *Bosley* v. *McLaughlin,* 236 U. S. 385; *Miller* v. *Wilson,* 236 U. S. 373; *Riley* v. *Mass.,* 232 U. S. 671; *Atkin* v. *Kansas,* 191 U. S. 207; *Arizona Copper Co.* v. *Hammer,* 250 U. S. 400; *New York Cent. Ry. Co.* v. *White,* 243 U. S. 188; *New York Cent. Ry. Co.* v. *Bianc,* 250 U. S. 596. See, also, *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Na-*

tional Safety Deposit Co. v. *Stead,* 232 U. S. 58; *Manigault* v. *Springs,* 199 U. S. 472; *Grand Trunk W. R. R. Co.* v. *R. R. Comm'rs. of Indiana,* 221 U. S. 400. The act is not invalid because it operates only when there is a controversy. *Miller* v. *Wilson,* 236 U. S. 373. The claim of confiscation is not well founded. The fact that an industry is doing business at a loss cannot defeat a proper exercise of the police power. In all cases where an exercise of the police power was challenged, and the point of the loss to the individual has been raised, it has been decided adversely to such contention (except in price-fixing cases). *Mugler* v. *Kansas,* 123 U. S. 623; *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306; *Hadacheck* v. *Sebastian,* 239 U. S. 394; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548.

The plaintiff in error has proven no operating loss due to limitation of the hours of labor of its employees. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339. The burden was upon the Packing Company to establish that the order of the Industrial Court was confiscatory.

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

This was an original proceeding in mandamus in the Supreme Court of Kansas to compel the Wolff Packing Company to put into effect an order of a state agency, called the Court of Industrial Relations, determining a dispute respecting wages, hours of labor and working conditions in a slaughtering and packing plant owned and operated by the company. The order was made in a compulsory proceeding under a Kansas statute, called the Industrial Relations Act, c. 29, Laws 1920, Special Session, and consisted of 19 distinct paragraphs—some fixing wages, some fixing hours of labor and pay for overtime, and others prescribing working conditions. After a hear-

ing, the Supreme Court eliminated the paragraphs relating to working conditions, because made without the required notice, and awarded a peremptory writ of mandamus commanding obedience to the other paragraphs; 109 Kan. 629; 111 Kan. 501. That judgment was brought to this Court for review and was reversed with a direction that the case be remanded for further proceedings not inconsistent with the opinion rendered at the time. 262 U. S. 522. After receiving the mandate, the state court vacated its original judgment; eliminated the paragraphs relating to working conditions and those fixing wages; also eliminated from the paragraphs fixing hours of labor the clauses relating to pay for overtime; and awarded a peremptory writ of mandamus commanding obedience to what remained of the last paragraphs. 114 Kan. 304. On a rehearing, the court modified that judgment by awarding a peremptory writ of mandamus to compel obedience to the paragraphs fixing hours of labor, including the clauses relating to pay for overtime. 114 Kan. 487. The paragraphs to which obedience was thus finally commanded are as follows:

"3. A basic working day of eight hours shall be observed in this industry; but a nine-hour day may be observed not to exceed two days in any one week without penalty: *Provided, however,* That if the working hours of the week shall exceed forty-eight in number, all over forty-eight shall be paid for at the rate of time and one-half: furthermore, in case a day in excess of the eight hour day shall be observed more than two days in any one week, all over eight hours, except for said two days in said week, shall be paid for at the rate of time and one-half, even though the working hours of the week may be forty-eight hours or fewer."

"14. Workers paid by the week or day, if employed within the plant and not within the office or sales department, shall be subject to hours of work and overtime

as other employees under the terms of finding No. 3 hereof."

"19. In departments operating twenty-four hours a day and seven days a week, each employee therein shall be entitled to one day off each week. In other departments work performed on Sunday and legal holidays shall be paid for at the rate of time and one-half."

The order, according to its terms, was to remain in force until changed by the Court of Industrial Relations or by agreement of the parties with the approval of that agency.

The company has brought the case here again—this time on two writs of error. One covers the judgment first entered after receipt of the mandate of this Court, and the other covers the judgment entered on the rehearing. The first of these writs can serve no purpose and must be dismissed. The rehearing was seasonably requested and the judgment entered thereon became the final judgment, the other being superseded by it.

Throughout the mandamus proceedings the company insisted that the Industrial Relations Act, on which the order was based, was in conflict with the provision of the Fourteenth Amendment that no State shall deprive any person of liberty or property without due process of law. This insistence was wholly rejected when the original judgment, heretofore reversed, was rendered, and was largely rejected when the judgment on the rehearing was given.

When the case was first before this Court the discussion at the bar and in the briefs chiefly related to the validity of the parts of the Act permitting the fixing of wages; and the opinion then delivered particularly dealt with that question, the ultimate conclusion, as expressed therein, being:

"We think the Industrial Court Act, in so far as it permits fixing of wages in plaintiff in error's packing

house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

That conclusion, without more, required a reversal of the judgment of the state court. The parts of the Act permitting the fixing of hours of labor were not specially dealt with, and were not affected by the decision, save as the reasons on which it proceeded might be applicable to them. The reversal was with a direction that the case be remanded for further proceedings not inconsistent with this Court's decision, and therefore the mandate operated particularly to require that the parts of the Act permitting the fixing of wages be regarded as invalid.

In the proceedings which followed the receipt of the mandate, the state court held that the other parts of the Act were separable from those permitting the fixing of wages, and also pronounced them constitutional. As the question of separability was a state question, the decision of that court thereon is conclusive here. *Dorchy* v. *Kansas,* 264 U. S. 286; *Hallanan* v. *Eureka Pipe Line Co.,* 261 U. S. 393, 397. The decision on the constitutional question is all that we can review.

Both parties rely on our decision when the case was first here. One insists that by reversing the original judgment of the state court, and not merely a part of it, we adjudged the invalidity of the entire Act; and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid. Both contentions are wrong. "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided," *Mutual Life Insurance Company* v. *Hill,* 193 U. S. 551, 553.

The company next contends that the decision, even though not in terms determining the question of the valid-

ity of the provisions permitting the fixing of hours of labor, recognized and gave effect to principles which are applicable to that question and if applied will solve it. A survey of the Act and of the decision will show that this contention is well taken.

The declared and adjudged purpose of the Act is to ensure continuity of operation and production in certain businesses which it calls "essential industries." To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the State to compel compliance with its order. The order is to continue in effect for such reasonable time as the agency may fix, or until changed by agreement of the parties with its approval. The employer may discontinue the business (a) where it can be conducted conformably to the order only at a loss, or (b) where for good cause shown the agency approves; and individual employees may quit the service in the exercise of a personal privilege, but may not induce others to quit or combine with them to do so. With these qualifications both employer

and employees are required to continue the business on the terms fixed in the order, violations and evasions being penalized. The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system and correspondingly limited in purpose and field of application. No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing of wages regard is to be had for what is fair between employer and employees, and in the fixing of hours of labor regard is to be had for what are healthful periods; but neither is to be fixed save in the compulsory adjustment of an endangering controversy to the end that the business shall go on.

The following excerpt from the opinion of the Supreme Court of the State in *State ex rel.* v. *Howat,* 109 Kan. 376, 417, explains the pervading theory of the Act:

" Heretofore the industrial relationship has been tacitly regarded as existing between two members—industrial manager, and industrial worker. They have joined wholeheartedly in excluding others. The legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation and distribution of the necessaries of life—the public. The legislature also proceeded on the theory the public is not a silent partner. When the dissensions of the other two become flagrant, the third member may see to it the business does not stop."

On three occasions when the Act was before us we referred to it as undertaking to establish a system of " compulsory arbitration." *Howat* v. *Kansas,* 258 U. S. 181, 184; *Wolff Packing Company* v. *Court of Industrial Relations,* 262 U. S. 522, 542; *Dorchy* v. *Kansas,* 264 U. S. 286, 288. The Supreme Court of the State in a recent opinion criticizes this use of the term " arbitration."

State v. *Howat,* 116 Kan. 412, 415. We recognize that in its usual acceptation the term indicates a proceeding based entirely on the consent of the parties. And we recognize also that this Act dispenses with their consent. Under it they have no voice in selecting the determining agency or in defining what that agency is to investigate and determine. And yet the determination is to bind them even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration. Of course, our present concern is with the essence of the system rather than its name. In this connection it is well to observe that in the opinion last mentioned the state court recognizes that the system, while intended to be just between employer and employees, proceeds on the theory that the public interest is paramount, as was explained in *State ex rel.* v. *Howat, supra.*

The survey just made of the Act, as construed and applied in the decisions of the Supreme Court of the State, shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of business, but to authorize the state agency to fix them where, and in so far as, they are the subjects of a controversy the settlement of which is directed in the interest of the public. In short, the authority to fix them is intended to be merely a part of the system of compulsory arbitration and to be exerted in attaining its object, which is continunity of operation and production.

When the case was first here the question chiefly agitated, and therefore discussed and decided, was whether the authority to fix wages as an incident of the compulsory arbitration could be applied to a business like that of the Wolff Company consistently with the protec-

tion which the due process of law clause of the Fourteenth Amendment affords to the liberty of contract and rights of property. The question was answered in the negative and the Act was held invalid in so far as it gives that authority. The subject was much considered and the principles which were recognized and applied were distinctly stated.

At the outset the Court pointed out that the Act assumes as a "necessary postulate" that the State, in the interest of the public, "may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business or employment on terms fixed by an agency of the State if they cannot agree." Then, after referring to the limited privilege of withdrawing from the business or employment which the Act accords to owners and employees who may be dissatisfied with the determination, the Court said [534]:

"These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment. *Meyer* v. *Nebraska, ante,* 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins* v. *Children's Hospital,* 261 U. S. 525."

Various matters which were relied on as justifying the attempted restraint or abridgement were considered and pronounced inadequate. Among them was the assumption in the Act that a business like that in question—preparing food for sale and human consumption—is so far

affected with a public interest that the State may compel its continuance, and, if the owner and employees cannot agree, may fix the terms through a public agency to the end that there shall be continuity of operation and production. This assumption was held to be without any sound basis and its indulgence by the state legislature was declared not controlling. The court recognized that, in a sense, all business is of some concern to the public and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees. Care was taken to point out that operating a railroad, keeping an inn, conducting an elevator and following a common calling are not all in the same class, and particularly to point out the distinctions between a quasi-public business conducted under a public grant imposing a correlative duty to operate, a business originally private which comes to be affected with a public interest through a change *in pais,* and a business which not only was private in the beginning but has remained such. The conclusion was that power to compel the continuance of a business because affected with a public interest is altogether exceptional. On this subject the Court said:

"An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes, *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 320; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 256, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, it usually distinguishes private from quasi-public occupations."

"It involves a more drastic exercise of control to impose limitations of continuity growing out of the public

character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service."

"The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The State cannot be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment."

"The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Railroad Commission,* 254 U. S. 513, it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner [in another field] when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable."

Applying these principles, the Court was of opinion that the business in question is one which the State is without power to compel the owner and employees to continue.

On further reflection we regard the principles so stated and applied as entirely sound. They are as applicable now as they were then. The business is the same and the parties are the same. So, we reach the same conclusion now that we reached then.

The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.

It follows that the state court should have declined to give effect to any part of the order of the state agency.

No. 207. Writ of error dismissed.

No. 299. Judgment reversed.

DECISIONS PER CURIAM, FROM JANUARY 13, 1925, TO AND INCLUDING APRIL 13, 1925, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 698. UNITED STATES EX REL. FINK *v.* TOD, COMMISSIONER OF IMMIGRATION. Certiorari to the Circuit Court of Appeals for the Second Circuit. January 13, 1925. Judgment reversed with costs; and cause remanded to the District Court of the United States for the Southern District of New York with directions to discharge the petitioner, upon confession of error by *Solicitor General Beck,* for respondent. *Mr. Max J. Kohler* and *Mr. Louis Marshall* for petitioner.

No. 172. COWOKOCHEE *v.* JAMES A. CHAPMAN AND R. M. MCFARLIN. Argued January 15, 1925. Decided January 15, 1925. Writ of error dismissed. *Mr. Lewis C. Lawson* for plaintiff in error. No appearance for defendant in error. See post, p. 572.

No. —, Original. *Ex parte:* IN THE MATTER OF FRANK C. MEBANE. Submitted January 12, 1925. Decided January 19, 1925. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. Benjamin Catchings* for petitioner.

No. —, Original. *Ex parte:* IN THE MATTER OF BENJAMIN CATCHINGS. Submitted January 12, 1925. Decided January 19, 1925. Motion for leave to file a petition for a writ of mandamus herein denied. *Mr. Benjamin Catchings,* pro se.

No. 534. ELLIS N. BLACK *v.* LURA W. BLACK. Error to the Supreme Court of the State of Ohio. Motion to

dismiss submitted January 12, 1925. Decided January 19, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Frank Davis, Jr.,* for defendant in error, in support of the motion. *Mr. John S. Black,* for plaintiff in error, in opposition to the motion.

No. 165. O. H. CHRISP *v.* JAMES C. DAVIS, DIRECTOR GENERAL, AS AGENT. Error to the Supreme Court of the State of Arkansas. Submitted January 14, 1925. Decided January 19, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Leslie C. Garnett* and *Mr. J. Merrick Moore* for plaintiff in error. *Mr. A. A. McLaughlin* for defendant in error.

No. 186. NICODEMUS B. HURR ET AL., *v.* EVERETT W. DAVIS ET AL. Error to the Supreme Court of the State of Minnesota. Submitted January 15, 1925. Decided January 19, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Robert C. Bell* for plaintiffs in error. No appearance for defendants in error.

No. 172. COWOKOCHEE *v.* JAMES A. CHAPMAN ET AL. Error to the Supreme Court of the State of Oklahoma. Argued January 15, 1925. Announced January 19, 1925.

Per Curiam. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Lewis C. Lawson,* for plaintiff in error. No appearance for defendant in error. (Judgment entered January 15, 1925.) See ante, p. 571.

No. 217. Bartlett & Kling *v.* United States. Appeal from the Court of Claims. Argued for appellant January 21, 1925. Decided January 21, 1925. Judgment affirmed, without prejudice. *Mr. Benj. Carter* for appellant. *Solicitor General Beck* and *Mr. Merrill E. Otis,* Special Assistant to the Attorney General, for the United States.

No. 190. Proprietors of the Locks and Canals on Merrimack River *v.* Boston and Maine Railroad. Error to the Land Court of the State of Massachusetts. Argued January 19, 1925. Decided January 26, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of *Hulbert* v. *Chicago,* 202 U. S. 275, 280; *Cleveland & Pittsburgh R. R. Co.* v. *Cleveland,* 235 U. S. 50, 53; *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.,* 252 U. S. 341, 344. *Mr. H. M. Davis,* with whom *Mr. Felix Rackeman* was on the brief, for plaintiffs in error. *Mr. A. R. Tisdale* for defendants in error.

No. 213. Board of Directors of Miller Levee District No. 2 *v.* Prairie Pipe Line Company. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued January 21, 1925. Decided January 26, 1925. Dismissed for the want of jurisdiction upon the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Southern*

Pacific Co. v. *Stewart,* 245 U. S. 359, 362; *Barnett* v. *Kunkel,* 264 U. S. 16, 21. *Mr. Henry Moore, jr.,* for appellant. *Mr. W. H. Arnold, jr.,* with whom *Messrs. W. H. Arnold, T. J. Flannelly,* and *H. C. Black* were on the brief, for appellee.

No. 221. JOHN CLAY ET AL., COPARTNERS, ETC., *v.* THE DISTRICT COURT OF THE TWELFTH DISTRICT OF THE STATE OF COLORADO, ETC. Error to the Supreme Court of the State of Colorado. Argued January 22, 1925. Decided January 26, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. P. A. Wells* and *Mr. Wm. V. Hodges,* for plaintiff in error. *Mr. LaFayette Twitchell* for defendant in error.

No. 228. BEN C. DAVISSON *v.* STATE OF NEW MEXICO. Error to the Supreme Court of the State of New Mexico. Motion to dismiss submitted January 23, 1925. Decided January 26, 1925. *Per Curiam.* Dismissed for the 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; (2) *Hurtado* v. *California,* 110 U. S. 516. *Mr. Milton J. Helmick* and *Mr. John W. Armstrong* for defendant in error in support of the motion, submitted. No brief filed for plaintiff in error.

No. 203. MATTHEW LOWE *v.* BENJAMIN E. DYSON, U. S. MARSHAL and

No. 204. WILLIAM P. MCCARTHY *v.* BENJAMIN E. DYSON, U. S. MARSHAL. Error to the District Court of the United States for the Southern District of Florida.

Argued January 19, 1925. Decided January 26, 1925. *Per Curiam.* Affirmed, upon the authority of *Riddle* v. *Dyche,* 262 U. S. 333, 335; *Goto* v. *Lane,* 265 U. S. 393, 401. *Mr. Merwin S. Bobst* for plaintiffs in error. *Solicitor General Beck* and *Assistant Attorney General Donovan* for the United States.

No. 760. Indian Refining Company *v.* John C. Taylor. Error to the Supreme Court of the State of Indiana. Motion to dismiss submitted January 26, 1925. Decided February 2, 1925. *Per Curiam.* Dismissed for want of jurisdiction, upon the authority of (1) *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Graham,* 253 U. S. 193, 195; (2) *Texas Co.* v. *Brown,* 258 U. S. 466, 477, 478. *Mr. U. S. Lesh,* for defendant in error, in support of the motion to dismiss. *Mr. James W. Noel, Mr. John Wallace Young* and *Mr. Richmond Wied,* for plaintiff in error, in opposition to the motion.

No. 247. Joseph O'Mara *v.* Harry C. Crampton. Error to the Supreme Court of the State of Indiana. Argued January 26, 27, 1925. Decided February 2, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Missouri & Kansas Interurban Ry. Co.* v. *Olathe,* 222 U. S. 185, 186; *Haseltine* v. *Bank,* 183 U. S. 130, 131; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175. *Mr. Henry W. Moore* for plaintiff in error. *Mr. Henry Adamson,* for defendant in error, submitted.

No. 251. G. L. Center *v.* United States. Error to the District Court of the United States for the Western District of South Carolina. Argued January 27, 1925. Decided February 2, 1925. *Per Curiam.* Affirmed, upon

the authority of *Bordeau* v. *McDowell,* 256 U. S. 465, 475. *Mr. Assistant Attorney General Donovan* for the United States. *Mr. Richard A. Ford,* for plaintiff in error, submitted.

No. 242. Forrest P. Tayloe *v.* United States. Appeal from the Court of Claims. Argued January 26, 1925. Decided February 2, 1925. *Per Curiam.* Affirmed, upon the authority of *Brawley* v. *United States,* 96 U. S. 168, 173; *Willard Co.* v. *United States,* 262 U. S. 489, 494. *Mr. Harry Peyton* for appellant. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Solicitor General Beck* was on the brief, for the United States.

No. 271. Anthony Colora *v.* State of New Jersey. Error to the Court of Errors and Appeals of the State of New Jersey. Submitted January 29, 1925. Decided February 2, 1925. *Per Curiam.* Affirmed, upon the authority of *Viglotti* v. *Pennsylvania,* 258 U. S. 403; *Molinari* v. *Maryland,* 263 U. S. 685. *Mr. Edmund A. Hayes* for plaintiff in error. *Mr. Joseph E. Stricker* for defendant in error.

No. 288. First National Bank of Mobile *v.* United States. Appeal from the District Court of the United States for the Southern District of Alabama. Argued January 30, 1925. Decided February 2, 1925. *Per Curiam.* Affirmed, upon the authority of *Essgee* v. *United States,* 262 U. S. 151, 155; *Hale* v. *Henkel,* 201 U. S. 43, 69; *Wilson* v. *United States,* 221 U. S. 361, 382; *Wheeler* v. *United States,* 226 U. S. 478, 490. *Mr. Merrill E. Otis,* with whom Solicitor General Beck was on the brief, for the United States. *Mr. Gregory L. Smith,* for appellant, submitted.

No. —, Original. Ex parte Barker. February 2, 1925. *Per Curiam.* Application for leave to file petition for a writ of habeas corpus denied, upon the authority of section 338 of the Criminal Code; *United States* v. *Pridgeon,* 153 U. S. 48, 63; Application for leave to proceed in forma pauperis denied.

No. 250. Yadkin Railroad Company et al. *v.* Ada Sigmon, Administratrix, etc. On writ of certiorari to the Supreme Court of the State of North Carolina. Argued January 27, 1925. Decided February 2, 1925. *Per Curiam.* Reversed, and remanded for further proceedings, upon the authority of *Davis* v. *Kennedy,* 266 U. S. 147; *Frese* v. *Chicago, Burlington & Quincy R. R. Co.,* 263 U. S. 1, 3. *Mr. S. R. Prince,* with whom *Mr. H. O. B. Cooper, Mr. B. S. Womble* and *Mr. L. E. Jeffries* were on the brief for petitioners. *Mr. T. D. Maness* for respondent.

No. 275. Dennis B. Chapin *v.* D. A. Walker, United States Marshal. Appeal from the District Court of the United States for the Western District of Texas. Submitted January 29, 1925. Decided February 2, 1925. *Per Curiam.* Cause transferred to the Circuit Court of Appeals for the Fifth Circuit, upon the authority of the act of September 14, 1922, c. 305, 42 Stat. 837; *Heitler* v. *United States,* 260 U. S. 438. *Mr. C. M. Chambers,* for appellant. *Solicitor General Beck, Assistant Attorney General Donovan* and *Mr. H. S. Ridgley* for the United States.

No. 341. United States *v.* Lucia Naponiello et al. Error to the District Court of the United States for the Northern District of Illinois. Motion to dismiss submitted November 17, 1924. Decided March 2, 1925. *Per*

Curiam. Dismissed for the want of jurisdiction upon the authority of *Farmers and Mechanics National Bank* v. *Wilkinson,* 266 U. S. 503; *Union Trust Co.* v. *Westhus,* 228 U. S. 519, 522–524; *Brown* v. *Alton Water Co.,* 222 U. S. 325, 331–334. *Mr. Charles N. Goodnow* for defendants in error in support of the motion. *Solicitor General Beck* and *Assistant Attorney General Donovan* for the United States in opposition to the motion.

No. 562. CORBY ESTATE *v.* CITY OF ST. JOSEPH. Error to the Supreme Court of the State of Missouri. Motion to dismiss submitted January 12, 1925. Decided March 2, 1925. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. John E. Dolman* for plaintiff in error. *Mr. H. K. White* for defendant in error.

No. 226. SALLIE CANARD *v.* R. E. SNELL, JR., ET AL. Error to the Supreme Court of the State of Oklahoma. Argued January 22, 23, 1925. Decided March 2, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Lewis C. Lawson* for plaintiff in error. *Mr. Joseph C. Stone* for defendants in error. See post, p. 596.

No. 254. JOSELEY TIGER *v.* AARON DRUMRIGHT ET AL. Error to the Supreme Court of the State of Oklahoma. Argued January 27, 28, 1925. Decided March 2, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as

amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. Lewis C. Lawson* for plaintiff in error. *Mr. Malcolm E. Rosser* for defendants in error, submitted.

No. 267. W. C. SINGLETON *v.* STATE OF GEORGIA. Error to the Supreme Court of the State of Georgia. Submitted January 29, 1925. Decided March 2, 1925. *Per Curiam.* Dismissed for the want of jurisdiction, upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6. *Mr. G. Y. Harrell* and *Mr. John C. Cooper* for plaintiff in error, submitted. No brief filed for defendant in error.

No. 590. J. C. CROWSON *v.* MICHAEL CODY ET AL. Error to the Supreme Court of the State of Alabama. Submitted December 8, 1924. Decided March 2, 1925. Petition for rehearing denied. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5, 6; *Ireland* v. *Woods,* 246 U. S. 323, 328; *Stadelman* v. *Miner,* 246 U. S. 544, 546; *Chicago Great Western R. R. Co.* v. *Basham,* 249 U. S. 164, 165; *Citizens' Bank* v. *Opperman,* 249 U. S. 448, 450. (See 266 U. S. 590.) *Mr. W. A. Gunter* for plaintiff in error. *Mr. Fred S. Ball* for defendants in error.

No. —. *Ex parte:* IN THE MATTER OF IVAN GLAVADANOVIC. March 2, 1925. Motion for leave to file a petition for a writ of mandamus herein denied. *Ivan Glavadanovic* pro se.

No. 389. GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, *v.* ROAD IMPROVEMENT DISTRICT NO. 7 OF POINSETT COUNTY, ARKANSAS. Order entered March 2, 1925.

ORDER. It is ordered by this court that the direction in the opinion heretofore filed [*ante*, p. 1] to send the case back to the District Court of the United States for the Eastern District of Arkansas is changed, and the case sent back to the Circuit Court of Appeals for the Eighth Circuit for further proceedings, and the mandate already issued shall be amended accordingly.

No. 13, Original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. IN EQUITY. Orders entered March 9, 1925. The report of the boundary commissioners herein of the work done and the time employed and expenses incurred in the survey, marking and mapping of the boundary between the States of Texas and Oklahoma, along the Red River in the Big Bend and Fort Augur areas pursuant to the decree of March 12, 1923, (261 U. S. 340) is approved and adopted. Compensation of commissioners fixed, to be charged, with the expenses shown in the report, as part of the costs of the case, to be borne and paid for by the three parties in the proportions specified in said decree, the parties to be credited with amounts already advanced.

[For the decree delivered on this day reciting and approving the report of survey along the Fort Augur area and establishing the boundary accordingly, see *ante*, p. 452.]

Motion of the National Petroleum & Refining Company for an order directing the receiver to recharge the expenses relating to well 169 denied.

Motion of the Supreme Oil Company, Sam Barkley and The Farmer's State Bank of Burkburnett, Texas, for particular relief specified therein, denied.

On consideration of the showing made by the Kirby Petroleum Company in response to the fourth paragraph

of the order of January 19, 1925 [*ante,* p. 9], the receiver is instructed to pay to such company $2,904.13 out of the net proceeds derived from well 139—such payment to be in full discharge of all claims against the receivership by reason of the work done and expenses incurred by such company and its predecessor, the Bass Petroleum Company, in drilling that well prior to the receivership. The objection made by Tom Testerman to the allowance and payment of this claim is overruled.

On consideration of that part of the thirteenth report of the receiver which shows at page 17 that certain net proceeds derived from wells within the portion of the receivership area adjudged to be in the State of Texas are without any known claimant, or belong to persons whose whereabouts are not known and who have not applied for them although warned to do so by due public notice, it is ordered that so much of such proceeds as remain thus unclaimed on April 15, 1925, be paid over to the State of Texas to the end that that State may take such action concerning the same as may be appropriate in respect of unclaimed property within the State. In making this payment the receiver is instructed to specify the well from which each fund was derived and otherwise to identify it as nearly as may be practicable.

The receiver is instructed to pay over to the Secretary of the Interior, as the representative of the United States, within ten days after the date of this order $1,100,000.00 out of the remaining net impounded funds derived from river-bed wells and from interest or other additions to such funds.

The receiver is instructed to continue the disbursement of the funds in his custody according to the instructions and orders heretofore given, and otherwise to prepare for closing up the receivership during the present term of this court.

Final compensation of receiver and his counsel fixed, and payment authorized as expenses of the receivership.

The above orders were announced by Mr. Justice Van Devanter.

No. 12, Original. STATE OF NEW MEXICO *v.* STATE OF COLORADO. In Equity. Motion for modification of decree submitted March 2, 1925. March 9, 1925, petition for modification of opinion in this cause denied. *Messrs. F. W. Clancy, O. A. Larrazolo* and *Jay Turley* for complainant. *Messrs. Wm. L. Boatright, Victor E. Keyes, Delph E. Carpenter, Oliver Dean* and *Chas. Roach,* for defendant.

No. —, Original. EX PARTE IN THE MATTER OF NICHOLAS J. CURTIS. March 9, 1925, motion for leave to file petition for mandate herein denied. *Nicholas J. Curtis,* pro se.

No. 705. AXEL W. HALLENBORG *v.* GREEN CONSOLIDATED COPPER COMPANY ET AL. Error to the Supreme Court of the State of New York. Motion to dismiss submitted March 2, 1925. Decided March 9, 1925. *Per Curiam.* Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Samuel Brennan,* with whom *Mr. Joseph B. Cotton* and *Mr. Roy F. Wrigley* were on the brief, for defendants in error in support of the motion to dismiss. *Mr. Edward L. Blackman* for plaintiff in error in opposition to the motion.

No. 309. FRANK DURAND ET AL. *v.* FIRST STATE BANK OF PHILIPSBURG. Error to the Supreme Court of the

State of Montana. Submitted March 2, 1925. Decided March 9, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. H. L. Maury* for plaintiffs in error. *Mr. R. E. McHugh* and *Mr. Milton S. Gunn* for defendant in error.

No. 364. NORTH PACIFIC STEAMSHIP COMPANY *v.* WILLIAM T. SOLEY. Error to the Supreme Court of the State of California. Submitted March 2, 1925. Decided March 9, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Ernest Clewe* for plaintiff in error. *Mr. Henry Heidelberg* and *Mr. Warren H. Pillsbury* for defendant in error.

No. —, Original. *Ex parte:* IN THE MATTER OF A. A. SANDERS. March 9, 1925. Motion for leave to file a petition for a writ of habeas corpus herein denied. *A. A. Sanders,* pro se.

No. 3, Original. STATE OF NEW MEXICO *v.* STATE OF TEXAS. March 10, 1925.

ORDER. It is ordered that the order heretofore made in this case, dated December 4, 1924, appointing Charles Warren, Esq., as special master, be amended by adding the following: "The master may in his discretion receive a brief of an *amicus curiae* whom the court has already permitted to file a brief in this cause."

No. 248. OLUF O. GILSETH *v.* A. G. RISTY ET AL. Error to the Circuit Court of Minnehaha County, South Dakota. Motion to dismiss submitted March 9, 1925. Decided March 16, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6; (2) *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 450, 451; *Muse* v. *Arlington Hotel Co.,* 168 U. S. 430, 435; *United States* v. *Lynch,* 137 U. S. 280, 285. *Mr. William G. Porter* for defendants in error in support of the motion to dismiss. *Mr. C. O. Bailey* in opposition to the motion to dismiss.

No. 238. A. BRAMBINI ET AL. *v.* UNITED STATES ET AL.; and

No. 259. A. BRAMBINI ET AL. *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA, ETC., ET AL. Error to the Supreme Court of the State of California. Argued March 9, 1925. Decided March 16, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. Robert Ash,* with whom *Mr. R. P. Henshall* was on the brief, for plaintiffs in error. *Messrs. W. B. Wheeler, Edward B. Dunford* and *U. S. Webb,* were on the brief for defendants in error.

No. 281. COUNTY OF TUOLUMNE ET AL. *v.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA ET AL. Error to the Supreme Court of the State of California. Argued March 9, 10, 1925. Decided March 16, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of (1) section 237 of the Judicial Code, as amended by the

act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6; (2) *Schuyler National Bank* v. *Bollong,* 150 U. S. 85, 88; *Erie R. R. Co.* v. *Purdy,* 185 U. S. 148, 154; *Louisville & Nashville R. R. Co.* v. *Woodford,* 234 U. S. 46, 51. *Mr. William Grant,* for plaintiffs in error. *Mr. A. P. Cutten* and *Mr. Carl I. Wheat,* with whom *Mr. Hugh Gordon* and *Mr. Wm. B. Bosley* were on the brief, for defendants in error.

No. 321. E. E. McCalla Company et al. *v.* People of the State of California. Error to the District Court of Appeal, Second Appellate District, of the State of California. Argued March 10, 1925. Decided March 16, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. F. L. Guerena,* with whom *Mr. U. S. Webb* was on the brief, for defendant in error. *Mr. Samuel Herrick* for plaintiff in error, submitted.

No. 356. Cattina Sala *v.* A. Crane et al. Error to the Supreme Court of the State of Idaho. Motion to dismiss submitted March 10, 1925. Decided March 16, 1925. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 5–6. *Mr. John P. Gran* for defendants in error, in support of the motion to dismiss. *Messrs. C. C. Moore, Cyrus Drain* and *Dale D. Drain* for plaintiff in error, in opposition to the motion to dismiss.

No. 196. Bacon & Matheson Forge Company et al. *v.* United States. Appeal from the Circuit Court of

Appeals for the Ninth Circuit. Argued March 9, 1925. Decided March 16, 1925. *Per Curiam.* Judgment affirmed upon the authority of *Hill* v. *United States,* 149 U. S. 593, 598; *Tempel* v. *United States,* 248 U. S. 121, 130; *Horstman Co.* v. *United States,* 257 U. S. 138, 146; *Klebe* v. *United States,* 263 U. S. 188, 191; *Pearson* v. *United States,* ante, p. 000. *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Mr. Randolph S. Collins* were on the brief, for the United States. *Mr. William H. Graham* and *Mr. James Kieper* for appellants, submitted.

No. 48. Federal Trade Commission *v.* Hammond, Snyder & Company;

No. 49. Federal Trade Commission *v.* Baltimore Grain Company; and

No. 50. Federal Trade Commission *v.* H. C. Jones Company, Inc. Error to the District Court of the United States for the District of Maryland. Argued March 12, 1925. Decided March 16, 1925. *Per Curiam.* Judgments affirmed upon the authority of *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298. *Mr. James A. Fowler,* with whom *Solicitor General Beck* and *Wm. H. Fuller* were on the brief, for plaintiff in error. *Mr. R. E. Lee Marshall* for defendant in error.

No. 650. Hiawassee River Power Company *v.* Carolina Tennessee Power Company. Error to the Supreme Court of the State of North Carolina. Motion to dismiss or affirm submitted March 16, 1925. Decided March 23, 1925. Dismissed for want of jurisdiction upon the authority of (1) section 237 of the Judicial Code, as amended by the act of September 6, 1916, c. 448, sec. 2, 39 Stat. 726; *Jett Bros. Distilling Co.* v. *Carrollton,* 252

U. S. 1, 5–6; (2) *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. C. Martin* for defendant in error in support of the motion to dismiss or affirm. *Messrs J. Crawford Biggs, John H. Frantz* and *R. M. McConnell* for plaintiff in error in opposition to the motion.

No. 269. Missouri Pacific Railroad Company *v.* Walnut Ridge-Alicia Road Improvement District. Error to the Supreme Court of the State of Arkansas. Motion to dismiss or affirm submitted March 16, 1925. Decided March 23, 1925. Judgment affirmed upon the authority of *Missouri Pacific R. R. Co.* v. *Western Crawford Road Improvement District,* 266 U. S. 187. *Messrs. G. B. Rose, D. H. Cantrell, J. F. Loughborough* and *A. W. Dobyns* for defendant in error in support of the motion to dismiss or affirm. *Messrs. Thomas B. Pryor, Edward J. White* and *Harry L. Ponder* for plaintiff in error in opposition to the motion.

No. 767. United States *v.* Board of County Commissioners of Osage County, Oklahoma, et al. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Argued March 18, 1925. Decided April 13, 1925. *Per Curiam.* Decree affirmed, upon the authority of *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 402; *Bodkin* v. *Edwards,* 255 U. S. 221, 223; *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86. *Mr. S. W. Williams,* Special Assistant to the Attorney General, with whom *Solicitor General Beck* and *Assistant Attorney Wells* were on the brief, for the United States. *Mr. Preston A. Shinn* for appellee.

PETITIONS FOR CERTIORARI GRANTED, FROM JANUARY 13, 1925, TO AND INCLUDING APRIL 13, 1925.

No. 771. JAMES C. DAVIS, AGENT, ETC., *v.* ABRAHAM WEISS, ADMINISTRATOR, ETC. January 26, 1925. Petition for a writ of certiorari to the Municipal Court of the City of Boston, State of Massachusetts, granted. *Mr. Arthur W. Blackman* for petitioner. *Mr. Benjamin Rabalsky* for respondent.

No. 663. CHESAPEAKE & OHIO RAILWAY COMPANY *v.* A. F. THOMPSON MANUFACTURING COMPANY. March 2, 1925. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia granted. *Mr. C. N. Davis* and *Mr. C. W. Strickling* for petitioner. *Mr. Henry Simms* and *Mr. Lewis A. Staker* for respondent.

Nos. 786 and 787. JAMES C. DAVIS, FEDERAL AGENT, ETC., *v.* E. H. PRINGLE, TRUSTEE. March 2, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. A. A. McLaughlin* for petitioner. *Mr. Nath. B. Barnwell* and *Mr. F. H. Horlbeck* for respondent.

No. 720. HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, ET AL., *v.* HARRY W. VOSS, TRUSTEE. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Harold Taylor* for petitioners. *Mr. Henry B. Walker* for respondent.

No. 858. JOSEPH P. MARGOLIN *v.* UNITED STATES. March 2, 1925. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Second Circuit granted. *Mr. Benjamin S. Kirsh* and *Miss Susan Brandeis* for petitioner. *The Attorney General* for the United States.

No. 844. Pacific American Fisheries *v.* Territory of Alaska. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. E. S. McCord, Mr. Warren Gregory* and *Mr. R. E. Robertson* for petitioner. *Mr. John Rustgard* for respondent.

No. 864. Oscar Thornton et al. *v.* United States. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. K. Wilcox* and *Mr. John W. Bennett* for petitioners. *The Attorney General* for the United States.

No. 872. Panama Railroad Company *v.* Agapito Vasquez, as Administrator, etc. March 9, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York granted. *Mr. Richard Reid Rogers* for petitioner. *Mr. Frederick R. Grover, Mr. Cletus Keating* and *Mr. Vernon S. Jones* for respondent.

No. 876. St. Louis-San Francisco Railway Company *v.* Odell Mills, as Administratrix of the Estate of Ira S. Mills, Deceased. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Forney Johnston* for petitioner. No appearance for respondent.

No. 891. Chicago, Milwaukee & St. Paul Railway Company *v.* Edith F. Coogan, Special Administratrix,

ETC. March 16, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota granted. *Mr. F. W. Root* and *Mr. O. W. Dynes* for petitioner. *Mr. Lyle Pettijohn* for respondent.

No. 922. HARTFORD ACCIDENT & INDEMNITY COMPANY OF HARTFORD *v.* SOUTHERN PACIFIC COMPANY ET AL. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. E. C. Brandenburg* for petitioner. No appearance for respondents.

No. 931. HENRY P. KEITH, LATE COLLECTOR, ETC., *v.* EMMA B. JOHNSON, AS ADMINISTRATRIX, ETC. March 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Beck* for petitioner. *Mr. Sidney V. Lowell* for respondent.

No. 960. UNITED STATES *v.* JAMES DAUGHERTY. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Beck, Assistant Attorney General Donovan* and *Mr. H. S. Ridgely* for the United States. *Mr. John Spalding Flannery* for respondent.

No. 966. CHESAPEAKE & OHIO RAILWAY COMPANY *v.* ANNIE NIXON, ADMINISTRATRIX. April 13, 1925. Petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of Virginia granted. *Mr. Randolph Harrison* for petitioner. No appearance for respondent.

No. 972. JOSE ALEJANDRINO *v.* MANUEL L. QUEZON ET AL. April 13, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Claro M. Recto* for petitioner. *Mr. Pablo G. Corinsta* and *Mr. Guillermo B. Guervara* for respondents.

No. 993. CHARLES HAMMER *v.* UNITED STATES. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Robert H. Elder* for petitioner. No appearance for respondent.

No. 897. JAMES C. DAVIS, DIRECTOR GENERAL, ETC., *v.* MICHIGAN TRUST COMPANY, RECEIVER, ETC. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. A. A. McLaughlin* for appellant. *Mr. Stuart E. Knappen* for appellee.

No. 898. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* UNITED STATES. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Homer W. Davis* and *Mr. John G. Drennan* for petitioner. *Solicitor General Beck* for the United States.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM JANUARY 13, 1925, TO AND INCLUDING APRIL 13, 1925.

No. 778. STANDARD OIL COMPANY *v.* UNITED STATES ET AL. January 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit

denied. *Mr. George W. P. Whip* for petitioner. *Mr. Solicitor General Beck, Mr. J. Frank Staley* Special Assistant to the Attorney General, *Mr. Arthur M. Boal* and *Mr. Frederick R. Conway* for respondents.

Nos. 792 to 799. Sagamore Coal Company et al. *v.* The Mountain Water Supply Company and others. January 19, 1925. Petition for writs of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Edwin W. Smith, Mr. E. C. Higbee* and *Mr. William M. Robinson* for petitioners. *Mr. George W. Woodruff, Mr. George E. Alter* and *Mr. James S. Moorhead* for respondents.

No. 809. Henry S. McPherson, Trustee *v.* Massachusetts Trust Company. January 19, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Joseph B. Jacobs* for petitioner. No appearance for respondent.

No. 830. Banco di Roma, *plaintiff in error, v.* Philippine National Bank. January 19, 1925. Petition for a writ of certiorari herein denied. *Mr. Carroll G. Walter,* for plaintiff in error, in support of the petition. *Mr. John T. Loughran,* for defendant in error, in opposition to the petition.

No. 777. Chippewa Springs Corporation *v.* Morand Brothers, Inc. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. C. Paul* and *Mr. E. S. Rogers* for petitioner. *Mr. George A. Chritton* for respondent.

No. 811. E. N. MOORE ET AL. *v.* UNITED STATES. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert Ash* for petitioners. *The Attorney General* for the United States.

No. 812. GLEN C. TOBIAS *v.* UNITED STATES. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter W. Stevens* for petitioner. *The Attorney General* for the United States.

No. 813. MARTIN J. CULLEN ET AL. *v.* UNITED STATES. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry A. Chamberlin* and *Mr. Thomas P. White* for petitioners. *The Attorney General* for the United States.

No. 814. THOMAS V. KING *v.* UNITED STATES. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry A. Chamberlin* and *Mr. Thomas P. White* for petitioner. *The Attorney General* for the United States.

No. 820. DAVID CROWTHER *v.* WINFORD P. LARSON. January 26, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Frank A. Whiteley* for petitioner. No appearance for respondent.

No. 821. DAVID CROWTHER *v.* WINFORD P. LARSON. January 26, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

Mr. Frank A. Whiteley for petitioner. No appearance for respondent.

No. 823. WALBRIDGE-ALDINGER COMPANY *v.* A. J. RUDD ET AL. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles West* and *Mr. Everett Petry* for petitioner. *Mr. I. L. Underwood, Mr. William F. Tucker* and *Mr. Huletle F. Aby* for respondents.

No. 835. CENTRAL LEATHER COMPANY *v.* STEAMSHIP GOYAZ, HER ENGINES, ETC., ET AL. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for petitioner. *Mr. William A. Purrington* and *Mr. Frank J. McConnell* for respondents.

No. 836. SCHMOLL FILS & COMPANY *v.* STEAMSHIP GOYAZ, HER ENGINES, ETC., ET AL. January 26, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* and *Mr. Oscar R. Houston* for petitioner. *Mr. William A. Purrington* and *Mr. Frank J. McConnell* for respondents.

No. 801. MURPHY WALL BED COMPANY ET AL. *v.* RIP VAN WINKLE WALL BED COMPANY. February 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William K. White* for petitioners. *Mr. A. W. Boyken* for respondent.

No. 817. WILLIAM M. HARDIE COMPANY *v.* ARTHUR H. LAMBORN ET AL. February 2, 1925. Petition for a writ

of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Samuel Williston* and *Mr. H. A. Hauxhurst* for petitioner. *Mr. Louis O. Van Doren* for respondents.

No. 827. CHARLES V. DUFFY, FORMER COLLECTOR, ETC., *v.* JOHN O. H. PITNEY ET AL., EXECUTORS, ETC. February 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Solicitor General Beck* for petitioner. *Mr. Corwin Howell* for respondents.

No. 828. FRANK C. FERGUSON, COLLECTOR, ETC., *v.* JOHN O. H. PITNEY ET AL., EXECUTORS, ETC. February 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Solicitor General Beck* for petitioner. *Mr. Corwin Howell* for respondents.

No. 842. T. A. EVANS *v.* UNITED STATES. February 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. W. Bradford* for petitioner. *The Attorney General* for the United States.

No. 846. HARRY DODD, TRUSTEE IN BANKRUPTCY, ETC., *v.* EUGENIA S. WESTMORELAND. February 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter S. Dillon* for petitioner. *Mr. Robert C. Alston* for respondent.

No. 850. LESLIE WALDECK ET AL. *v.* UNITED STATES. February 2, 1925. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ronald C. Oldham* for petitioners. *The Attorney General* for the United States.

No. 863. Mary Kuras, Administratrix, etc., *v.* Michigan Central Railroad Company. February 2, 1925. Petition for a writ of certiorari to the Court of Appeals of Lucas County, State of Ohio, denied. *Mr. Frank S. Monnett* for petitioner. No appearance for respondent.

No. 226. Sallie Canard *v.* R. E. Snell, Jr., et al. Error to the Supreme Court of the State of Oklahoma. March 2, 1925. Petition for writ of certiorari herein denied. *Mr. Lewis C. Lawson* for plaintiff in error. *Mr. Joseph C. Stone* for defendant in error. See *ante,* p. 578.

No. 780. Jacques Rousso *v.* Reuben E. Barber et al. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Joshua R. H. Potts* and *Mr. George B. Parkinson* for petitioner. *Mr. Moseley Arthur Keller* for respondent.

No. 824. Oliver American Trading Company, Inc., *v.* Government of the United States of Mexico et al. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert F. Greacen* and *Mr. Alfred Hayes* for petitioner. *Mr. Jerome S. Hess* and *Mr. Harold B. Elgar* for respondents.

No. 831. William J. Read *v.* United States. March 2, 1925. Petition for a writ of certiorari to the Court of

Appeals of the District of Columbia denied. *Mr. Harold Harper* and *Mr. Eugene Underwood* for petitioner. *The Attorney General* for the United States.

No. 843. CLYDE HUNTER *v.* UNITED STATES. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clair McTurnan, William R. Higgins, Charles M. McCabe* and *Merrill Moores,* for petitioner. *Solicitor General Beck* and *Assistant Attorney General Willebrandt* for the United States.

No. 845. ROBESON PROCESS COMPANY *v.* JACOB S. ROBESON ET AL. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. A. M. Houghton, Mr. Julius M. Mayer* and *Mr. F. P. Warfield* for petitioner. *Mr. Clair W. Fairbank* and *Mr. Irving M. Obright* for respondents.

No. 860. MARY H. SELVAGE *v.* BROCKENBROUGH LAMB, TRUSTEE. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert W. Talley* for petitioner. *Mr. James E. Cannon* for respondent.

No. 861. UNITED STATES *v.* MAURICE P. DAVIDSON, TRUSTEE, ETC. March 2, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Beck, Mr. Chauncy G. Parker, Mr. E. M. Allison, Jr.,* and *Mr. Henry M. Ward,* for the United States. *Messrs. John M. Woolsey, John S. Sheppard, Delbert M. Tibbetts* and *Alvin C. Cass,* for respondent.

No. 837. JOHN MULLEN ET AL. *v.* UNITED STATES. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. B. Tinkham* for petitioners. *The Attorney General* for the United States.

No. 855. WILLIAM A. GREENE, AS TRUSTEE IN BANKRUPTCY, ETC., *v.* J. L. BOOTH, AS TRUSTEE IN BANKRUPTCY, ETC. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Walter B. Allen* for petitioner. *Mr. Challon B. Ellis* for respondent.

No. 862. J. W. PATT *v.* UNITED STATES. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Bryan H. Tivnen* and *Mr. Michael M. Doyle* for petitioner. *The Attorney General* for the United States.

No. 868. CHICAGO & ALTON RAILROAD COMPANY *v.* MARY AMBROSE, ADMINISTRATRIX, ETC. March 9, 1925. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied. *Mr. Charles M. Miller* and *Mr. Silas H. Strawn* for petitioner. *Mr. Mont T. Prewitt* for respondent.

No. 869. COMPANIA GENERAL DE TABACOS DE FILIPINAS *v.* THE INSULAR COLLECTOR OF CUSTOMS. March 9, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Harry W. VanDyke* for petitioner. *Mr. A. W. Brown* for respondent.

No. 877. HOWARD S. MELLOT *v.* CHARLES R. MABEE ET AL., TRUSTEES IN BANKRUPTCY, ETC. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Donald F. Melhorn* for petitioner. *Mr. Allen J. Seney* for respondent.

No. 878. CLYDE A. DAVIS, TRUSTEE IN BANKRUPTCY, ETC. *v.* CHARLES R. MABEE ET AL. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Donald F. Melhorn* for petitioner. *Mr. Allen J. Seney* for respondent.

No. 880. TERRELL M. RAGAN, TRUSTEE *v.* ALLAN FORBES, TRUSTEE. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Jacob J. Kaplan* for petitioner. *Mr. William D. Turner* for respondent.

No. 882. FRANCE AND CANADA STEAMSHIP CORPORATION, AS OWNER OF THE SCHOONER OAKLEY C. CURTIS, ETC. *v.* MIDLAND LINSEED PRODUCTS COMPANY. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carroll G. Walter* and *Mr. Chas. D. Francis* for petitioner. *Mr. Herman S. Herturg* for respondent.

No. 883. GEORGE L. MOORE ET AL. *v.* UNITED STATES. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Bryan H. Tivnen* and *Mr. Michael M. Doyle* for petitioners. *The Attorney General* for the United States.

No. 884. Traylor Engineering and Manufacturing Company *v.* Worthington Pump and Machinery Corporation. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frank B. Fox, Henry N. Paul* and *George Wharton Pepper* for petitioner. *Mr. James Rice* and *Mr. Chas. H. Hawson* for respondent.

No. 886. Louis Brownstein et al. *v.* United States. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *The Attorney General* for the United States.

No. 889. Alden W. Bohm *v.* Chicago, Milwaukee & St. Paul Railway Company. March 9, 1925. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. F. M. Miner* for petitioner. *Mr. F. W. Root* and *Mr. O. W. Dynes* for respondent.

No. 890. Christina M. Hoeffner, as Administratrix, etc. *v.* National Steamship Company. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. S. Mauk* for petitioner. *Mr. Joe Crider, Jr.* and *Mr. J. Hampton Hodge* for respondent.

No. 895. C. W. Johnson, Trustee in Bankruptcy of Johnson & Company, Bankrupts *v.* Sallie B. Duncan. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Mr. Emile Steinfeld for petitioner. *Mr. James Garnett* for respondent.

No. 900. SAMUEL REICH, TRUSTEE IN BANKRUPTCY, ETC. *v.* KENNETH W. MCNEIL. March 9, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William H. Comley* for petitioner. *Mr. Edward M. Grout* for respondent.

No. 396. JOHN C. ROSS *v.* STATE OF SOUTH DAKOTA. On writ of error to the Supreme Court of South Dakota. March 16, 1925. Petition for a writ of certiorari herein denied. *Mr. U. S. G. Cherry* and *Mr. Holton Davenport* for plaintiff in error in support of the petition. *Mr. Byron S. Payne* for defandant in error in opposition to the petition.

No. 834. JOSEPH L. LACKNER, ADMINISTRATOR *v.* MERRITT STARR, SURVIVING PARTNER OF THE FIRM OF MILLER & STARR. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles H. Aldrich, Charles S. Cutting* and *Donald F. McPherson* for petitioner. *Messrs. Thornton M. Pratt, Fletcher Dobyns, Albert L. Hopkins* and *John S. Miller, Jr.,* for respondent.

No. 892. PERE MARQUETTE RAILWAY COMPANY *v.* LOVELAND & HINYAN ET AL. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John C. Shields* for petitioner. *Mr. Clare J. Hall* and *Mr. Joseph R. Gillard* for respondents.

No. 904. P. W. EWING *v.* E. B. SHAUVER ET AL. March 16, 1925. Petition for a writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Mr. John E. Semmes, Jr.,* for petitioner. *Mr. Henry William Hart* for respondents.

No. 906. THE BUTTERICK COMPANY ET AL. *v.* THE FEDERAL TRADE COMMISSION. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Herbert Noble, Scott Scammell, Julius M. Mayer* and *Hartwell P. Heath* for petitioners. *Solicitor General Beck* and *Mr. William H. Fuller* for respondent.

No. 917. EDWARD SMALE, JR., ET AL. *v.* UNITED STATES. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Everett Jennings* for petitioners. *The Attorney General* for the United States.

No. 941. MORRIS M. BECHER *v.* UNITED STATES. March 16, 1925. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Tuttle* and *Mr. Frank Hogan* for petitioner. *The Attorney General* for the United States.

No. 942. MORRAY E. BIRNBAUM *v.* UNITED STATES. March 16, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Otto S. Bowling* for petitioner. *The Attorney General* for the United States.

No. 945. TAN PHO ET AL. *v.* FAUSTINO LICHAUCO, AS GUARDIAN, ETC. March 16, 1925. Petition for a writ of

certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Frederick C. Fisher* and *Mr. Clyde A. DeWitt* for petitioners. No appearance for respondent.

No. 326. THOMAS F. DONNELLY *v.* COMMONWEALTH OF MASSACHUSETTS. On petition for writ of certiorari to Superior Court of Middlesex County, State of Massachusetts. March 20, 1925. Dismissed for want of prosecution. *Mr. Thomas F. Donnelly* for petitioner. No appearance for respondent.

No. 928. WILLIAM STEVENS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. March 23, 1925. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Mr. George S. Brengle* and *Mr. D. Roger Englar* for petitioner. *Mr. Gardiner Lathrop, Mr. Homer W. Davis* and *Mr. S. G. Bristow* for respondent.

No. 912. CARLOS M. RAMIREZ LOPEZ *v.* AMERICAN RAILROAD COMPANY OF PORTO RICO. March 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. José A. Poventud* for petitioner. *Mr. Francis H. Dexter* for respondent.

No. 939. UNITED STATES *v.* HAMILTON MICHELSON & COMPANY ET AL. March 23, 1925. Petition for a writ of certiorari to the Court of Customs Appeals denied. *Solicitor General Beck* and *Assistant Attorney General Hoppin* for the United States. No appearance for respondents.

No. 943. UNITED STATES *v.* MIDDLETON & COMPANY, ETC., ET AL. March 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Cir-

cuit denied. *Solicitor General Beck* and *Mr. J. Frank Staley,* Special Assistant to the Attorney General, for the United States. *Messrs. E. Willoughby Middleton, Alfred Huger* and *Julian Mitchell* for respondents.

No. 948. BAUER COOPERAGE COMPANY *v.* EDGAR STARK, EXECUTOR, ETC.;

No. 949. BAUER COOPERAGE COMPANY *v.* UNION SAVINGS BANK & TRUST COMPANY;

No. 950. BAUER COOPERAGE COMPANY *v.* LAWRENCE MAXWELL COMPANY; and

No. 951. BAUER COOPERAGE COMPANY *v.* EDGAR STARK, EXECUTOR, ETC. March 23, 1925. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Murray Seasongood* for petitioners. No appearance for respondents.

No. 953. NICK CHOLSKOS *v.* UNITED STATES. March 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Francis B. Kavanaugh* for petitioner. No appearance for respondent.

No. 959. MARCUS GARVEY *v.* UNITED STATES. March 23, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Gordon Battle* for petitioner. *Solicitor General Beck* and *Assistant Attorney General Donovan* for the United States.

No. 696. JOHN C. PARKER *v.* STATE OF TEXAS. April 13, 1925. Petition for a writ of certiorari herein to the Court of Criminal Appeals of the State of Texas dismissed

for failure to submit the same within the time prescribed in rule 37, paragraph 4. *Mr. Emil T. Simmang* for petitioner. No appearance for respondent.

No. 854. MINNIE M. WILLIAMS, ETC., EXECUTRIX, ETC., ET AL., *v.* FREEMAN B. CHRISTOPHER. April 13, 1925. Petition for a writ of certiorari to the Court of Appeals of Franklin County, State of Ohio, denied. *Mr. David F. Pugh* and *Mr. L. R. Pugh* for petitioner. *Mr. James N. Linton* for respondent.

No. 871. ELLA FOLEY, ADMINISTRATRIX *v.* NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY. April 13, 1925. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. John W. Townsend* for petitioner. *Mr. John A. Hartpence* and *Mr. Albert C. Wall* for respondent.

No. 955. PATRICK J. COLLINS ET AL., ETC. *v.* ANNA C. GIBSON. April 13, 1925. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George E. Sullivan* for petitioner. No appearance for respondent.

No. 956. FENNER & BEANE *v.* T. G. HOLT. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Burt W. Henry, John E. Hall, Warren Grice, Charles J. Bloch* and *L. C. Going* for petitioner. No appearance for respondent.

No. 957. WARREN W. WILLMERING *v.* UNITED STATES. April 13, 1925. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. W. Morrow* for petitioner. *The Attorney General* for the United States.

No. 963. SVEN NYQUIST *v.* UNITED STATES. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward J. McCrossin* for petitioner. *The Attorney General* for the United States.

No. 973. MICHAEL J. DERBY, OWNER, ETC. *v.* STEAM TUG PANTHER, HER ENGINES, ETC., NEW YORK MARINE COMPANY, CLAIMANT. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Pierre M. Brown* for petitioner. *Mr. James K. Symmers* for respondent.

No. 996. CAMDEN FIRE INSURANCE ASSOCIATION *v.* UNITED STATES MANUFACTURERS EXPORT ASSOCIATION. April 13, 1925. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Dix W. Noel* and *Mr. Arthur W. Clement* for petitioner. *Mr. John A. McManus* for respondent.

No. 840. JAMES D. BARTON *v.* LEYTE ASPHALT & MINERAL OIL COMPANY, LIMITED. April 13, 1925. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Augustus T. Seymour* for petitioner. *Mr. John Walsh* for respondent.

No. 965. F. G. BUFFINGTON *v.* STATE OF GEORGIA. April 13, 1925. Petition for a writ of certiorari to the

Court of Appeals of the State of Georgia denied. *Mr. M. B. Eubank* for petitioner. No appearance for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 13, 1925, TO AND INCLUDING APRIL 13, 1925.

No. 173. WALTER CARR *v.* A. ALEXSEN, MASTER, ET AL. Appeal from the District Court of the United States for the Eastern District of Virginia. January 14, 1925. Dismissed with costs, on motion of *Mr. J. C. Matthews*. *Mr. Harry K. Wolcott* and *Mr. Daniel Coleman* also appeared for the appellant. No appearance for appellee.

No. 131. ST. JOHNS ELECTRIC COMPANY *v.* CITY OF ST. AUGUSTINE, ETC., ET AL. Appeal from the District Court of the United States for the Southern District of Florida. January 19, 1925. Dismissed, per stipulation. *Mr. George C. Bedell* for appellant. No appearance for appellee.

No. 167. ST. JOHNS ELECTRIC COMPANY *v.* CITY OF ST. AUGUSTINE ET AL. Appeal from the District Court of the United States for the Southern District of Florida. January 19, 1925. Dismissed, per stipulation. *Mr. George C. Bedell* for appellant. *Mr. P. H. Odom* for appellee.

No. 211. R. V. MULLEN *v.* J. P. HURLEY ET AL. Appeal from the Circuit Court of Appeals for the Eighth Circuit. January 20, 1925. Dismissed with costs, pursuant to the 16th Rule, on motion of *Mr. H. L. Johnson* for appellees. *Mr. W. A. Chase* for appellant.

No. 340. UNITED STATES EX REL. HYMAN PATTON, ETC. *v.* TOD, AS COMMISSIONER OF IMMIGRATION. January 26,

1925. Dismissed, per stipulation, on motion of *Solicitor General Beck* for respondent. *Mr. A. S. Gilbert* for petitioner.

No. 253. SEABOARD AIR LINE RAILWAY COMPANY *v.* O. T. BELSHE. Error to the Supreme Court of the State of North Carolina. January 26, 1925. Dismissed with costs, on motion of *Mr. Murray Allen* for the plaintiff in error. *Mr. Clyde A. Douglass, Mr. William C. Douglass* and *Mr. Robert N. Simms* for defendant in error.

No. 263. BURNARD WHITTEN *v.* STATE OF FLORIDA. Error to the Supreme Court of the State of Florida. January 28, 1925. Dismissed with costs, on motion of *Mr. W. D. Bell* for the plaintiff in error. No appearance for defendant in error.

No. 244. UNITED STATES *v.* DEWITT T. LAW. Error to the District Court of the United States for the District of Montana. February 2, 1925. Dismissed, on motion of *Solicitor General Beck* for the United States. *Mr. DeWitt T. Law,* pro se.

No. 330. UNITED STATES *v.* HERBERT H. MCGOVERN. Error to the District Court of the United States for the District of Montana. March 2, 1925. Dismissed, on motion of *Solicitor General Beck* for the United States. No appearance for defendant in error.

No. 245. A. R. MCCULLOUGH ET AL., COPARTNERS, ETC., *v.* OLAF ANTON JANSON. Error to the Circuit Court of Appeals for the Ninth Circuit. March 2, 1925. Dis-

missed with costs, on motion of *Mr. O. P. Stidger* and *Mr. J. Hampton Hodge* for plaintiffs in error. No appearance for defendant in error.

No. 291. L. H. MYERS ET AL. *v.* CHARLES H. ANDERSON ET AL., COPARTNERS, ETC., ET AL. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 2, 1925. Dismissed with costs, per stipulation of counsel. *Mr. George C. Bedell* and *Mr. I. L. Purcell* for petitioners. *Mr. Giles J. Patterson* for respondents.

No. 485. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* RICHARD E. COLLINS ET AL., ETC.; and

No. 486. SOUTHERN PACIFIC COMPANY *v.* RICHARD E. COLLINS ET AL., ETC. Appeals from the District Court of the United States for the Northern District of California. March 2, 1925. Dismissed, per stipulation. *Mr. E. W. Camp* and *Mr. Gardiner Lathrop* for appellant in No. 485. No appearance for appellees in No. 485. *Messrs. Max C. Sloss, Henley Clifton Booth* and *William F. Herrin* for appellant in No. 486. No appearance for appellees in No. 486.

No. 788. WINCHESTER COOLEY *v.* C. C. OZMENT, RECEIVER. Error to the District Court of the United States for the District of New Mexico. March 2, 1925. Dismissed with costs, on motion of *Mr. E. L. Medler* for the plaintiff in error. No appearance for defendant in error.

No. 789. T. M. WINGO *v.* C. C. OZMENT, RECEIVER. Error to the District Court of the United States for the District of New Mexico. March 2, 1925. Dismissed with costs, on motion of *Mr. E. L. Medler* for the plaintiff in error. No appearance for defendant in error.

No. 879. CONTINENTAL CASUALTY COMPANY, ETC., ET AL. *v.* ALFRED W. AGEE, ADMINISTRATOR, ETC. On petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. March 2, 1925. Dismissed, on motion of *Mr. William W. Ray* for the petitioners. *Messrs. James L. DeVine, James A. Howell* and *Charles R. Hollingsworth* for respondent.

No. 888. PATRICK J. O'SHAUGHNESSY ET AL. *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of Alabama. March 2, 1925. Writ of error dismissed as to plaintiffs in error Benjamin Cody and Percy H. Kearnes, on motion of *Mr. Harry H. Smith* for plaintiffs in error. *The Attorney General* for the United States.

No. 924. T. FRANK SMITH *v.* SAM L. GROSS, U. S. MARSHAL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 9, 1925. Dismissed, on motion of *Messrs. J. M. McCormick, F. M. Etheridge* and *S. M. Lepturch* for petitioner. No appearance for respondent.

No. 925. L. J. ROBLING *v.* SAM L. GROSS, U. S. MARSHAL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 9, 1925. Dismissed, on motion of *Messrs. J. M. McCormick, F. M. Etheridge* and *S. M. Lepturch* for petitioner. No appearance for respondent.

No. 312. SALT LAKE COUNTY *v.* UTAH COPPER COMPANY. Error to the Circuit Court of Appeals for the Eighth Circuit. March 16, 1925. Dismissed with costs, on motion of *Mr. Charles C. Richards* for the plaintiff in error. No appearance for defendant in error.

No. 357. W. F. CLEGG ET AL., ETC., *v.* CITY OF SPARTANBURG ET AL. Error to the Supreme Court of the State of South Carolina. March 16, 1925. Dismissed with costs, on motion of *Mr. Sam J. Nicholls* for the plaintiffs in error. *Mr. Horance L. Bomar* for defendant in error.

No. 888. PATRICK J. O'SHAUGHNESSY ET AL. *v.* UNITED STATES. On writ of error to the United States District Court for the Southern District of Alabama. March 23, 1925. Writ of error dismissed as to plaintiffs in error Harry B. O'Connor, Daniel L. Jemison, Geronimo Perez, and James F. Daves, on motion of *Mr. Harry H. Smith* for the plaintiffs in error. *The Attorney General* for the United States.

No. 393. UNITED STATES *v.* A. E. BAUCH ET AL.;

No. 394. UNITED STATES *v.* C. F. WATERMAN ET AL.; and

No. 395. UNITED STATES *v.* A. E. BAUCH. Error to the District Court of the United States for the Eastern District of Washington. April 13, 1925. Dismissed, on motion of *Solicitor General Beck* for the United States. No appearance for defendants in error.

No. 38. IVORY NOVELTIES TRADING COMPANY *v.* FRANCOIS JOSEPH DE SPOTURNO COTY. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 13, 1925. Dismissed, per stipulation. *Mr. Charles H. Tuttle* and *Mr. William J. Hughes* for petitioner. *Messrs. F. D. McKenney, Hugo Mock* and *Asher Blum* for respondent.

No. 672. SOUTHERN PACIFIC COMPANY *v.* CHEVROLET MOTOR COMPANY OF CALIFORNIA. Error to the District

Court of the United States for the Northern District of California. April 13, 1925. Dismissed with costs, on motion of *Mr. Henley C. Booth* for the plaintiff in error. No appearance for defendant in error.

APPENDIX

GENERAL ORDERS IN BANKRUPTCY, Promulgated April 13, 1925.

It is ordered by the court that General Order in Bankruptcy No. 5, entitled "Frame of Petition," be amended by adding at the end thereof the following sentence:

Petitioners in involuntary proceedings whose claims rest upon assignment or transfer from other persons shall annex to one of the duplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof, and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

And it is further ordered that the following rules be adopted and established as an additional General Orders in Bankruptcy:

XXXIX

REPRESENTATION OF CREDITORS BY RECEIVERS OR THEIR ATTORNEYS

Neither a receiver nor his attorney shall solicit any proof of debt, power of attorney, or other authority to act for or represent any creditor for any purpose in connection with the administration of the estate in bankruptcy or the acceptance or rejection of any composition offered by a bankrupt.

XL

Receivers and Marshals as Custodians

A receiver or marshal appointed by the court to take charge of the property of a bankrupt after the filing of a petition shall be deemed to be a mere custodian within the meaning of Section 48 of the Bankruptcy Act, unless his duties and compensation are specifically enlarged by order of the court, upon proper cause shown, either at the time of the appointment or later.

XLI

Waiver of Right to Share in Composition Deposits

Before confirming a composition the judge of the court shall require all creditors and other persons who may have waived their right to share in the distribution of the deposit made by the bankrupt, for claims, fees, or otherwise, to set forth in writing and under oath all agreements with respect thereto with the bankrupt, his attorney, or any other person, and shall also require an affidavit by the bankrupt that he has not directly or indirectly paid or promised any consideration to any attorney, trustee, receiver, creditor, or other person in connection with the composition proceedings, except as set forth in such affidavit or the offer of composition, and that he has no knowledge of any such payment or promise by any other party.

XLII

Compensation of Attorneys, Receivers, and Trustees

1. Every attorney, receiver, and trustee seeking an allowance of compensation from a bankrupt estate for services rendered shall file with the referee a petition under oath, setting forth a full and detailed statement of such services and the amount claimed therefor, and, in the case of an attorney or receiver, the amount of the

partial allowance, if any, theretofore made. And such petition shall be accompanied by an affidavit of the applicant stating that no agreement has been made, directly or indirectly, and that no understanding exists, for a division of fees between the applicant and the receiver, the trustee, the bankrupt, or the attorney of any of them. In the absence of such petition and affidavit no allowance of compensation shall be made.

2. Such petition shall be heard at a meeting of creditors; and the referee in sending the notice of such meeting prescribed by Section 58 of the Bankruptcy Act, shall state by whom and in what amount the allowance of the compensation is asked.

XLIII

Fees and Expenses of Attorneys for Petitioning Creditors

The court may deny the allowance of any fee to the attorney for petitioning creditors or the reimbursement of his expenses, or both, if it shall appear that the proceedings were instituted in collusion with the bankrupt or were not instituted in good faith.

XLIV

Appointment of Attorneys for Receivers or Trustees

In any District in which there is a city having at the last Federal census a population of 250,000 or more, no attorney for a receiver or a trustee shall be appointed except upon the order of the court, which shall be granted only upon the petition of the receiver or trustee, stating the name of the counsel whom he wishes to employ, the reasons for his selection, and the necessity for employing counsel at all; and there shall be submitted with this petition an affidavit of the person recommended, showing that he is not employed by or connected with the bankrupt or any person having an interest adverse to the receiver, trustee, or creditors.

XLV

Auctioneers, Accountants, and Appraisers

No auctioneer or accountant shall be employed by a receiver or trustee except upon an order of the court expressly fixing the amount of the compensation or the rate or measure thereof. The compensation of appraisers shall be provided for in like manner in the order appointing them.

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